

IN THE U.S. DISTRICT COURT.
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
CAUSE NO. CACV-07-166-BLG-CSO

TIMOTHY McCULLOUGH	:
	:
Plaintiff	: COURT TRANSCRIPT
	:
vs.	: Pretrial Conference
	:
JOHNSON, RODENBURG & LAUINGER:	:
	:
Defendant	:

April 7, 2009

R E P O R T E D B Y:

VIRGINIA LEYENDECKER, Certified Shorthand
Reporter, (NJ License No. 1701) and Notary Public, on
the above date, commencing at 11:00 a.m., at the
James F. Battin United States Courthouse, 316 North
26th Street, Billings, Montana.

BEFORE: Hon. Carolyn S. Ostby

VK LEYENDECKER, LLC
20 Medicine Crow Road
Columbus, Mt. 59019 - (406) 322-5061

1 A P P E A R A N C E S:

2 HEENAN LAW FIRM
3 BY: JOHN HEENAN, ESQUIRE
 For the Plaintiff

4 BOHYER, SIMPSON & TRANEL, P.C.
5 BY: FRED SIMPSON, JR., ESQUIRE
 and JOHN BOHYER, ESQUIRE
 For the Defendant

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1 THE COURT CLERK: The Court has
2 set aside this time to hear the matter of
3 CACV-07-166-VLG-CSO, *Timothy McCollough v.*
4 *Johnson Rodenburg & Lauinger* for a final pretrial
5 conference and motion hearing.

6 THE COURT: Good morning.

7 MR. HEENAN: Good morning, Your
8 Honor.

9 MR. SIMPSON: Good morning, Your
10 Honor.

11 MR. BOHYER: Good morning, Your
12 Honor.

13 THE COURT: First of all, I
14 apologize for the error in the setting of the
15 hearing time. I know that confuses everything.

16 Moving on, the way I would like
17 to proceed is to conduct the hearing on the
18 motions in limine, get those decided, and then we
19 will take a short recess and move into the
20 conference room for conducting the final pretrial
21 conference.

22 So let's address ourselves, then,
23 to the motions. My understanding is the only two
24 motions that are currently outstanding are two
25 motions in limine, one filed on behalf of the

1 plaintiff and another one on behalf of the
2 defendant.

3 Do the parties agree those are
4 the only two motions that remain at issue?

5 MR. SIMPSON: Yes, Judge.

6 MR. HEENAN: Yes, Your Honor.

7 THE COURT: Let's take those in
8 the order filed. I believe the defendant filed a
9 motion in limine first.

10 I have read the briefs and
11 reached some tentative conclusions. In the
12 interest of expediency, what I propose is to
13 address each of the items in each of these
14 motions and give you my preliminary thoughts,
15 rather than just hear arguments because, as I
16 said, I looked at the briefs.

17 Then I will give you a chance to
18 be heard and then make a ruling. As I said, the
19 conclusions that I reached are tentative, but
20 they are based on study of the briefs and the
21 authorities cited in the briefs.

22 The defendant's motion is the
23 Court's Docket Number 100. It was filed on
24 February 23, 2009, and the first item that the
25 defendant seeks to preclude evidence on is

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1 Attorney Bruce Spencer filed a lawsuit on behalf
2 of CACV of Colorado, which was dismissed prior to
3 the filing of the lawsuit by Johnson, Rodenburg &
4 Lauinger. That motion has been withdrawn, that
5 part of this motion, and so that part will be
6 denied as moot.

7 The next is evidence that JRL and
8 its attorneys have filed other debt-collection
9 lawsuits or evidence about those lawsuits, and I
10 will combine this with the next one, which is all
11 testimony by witnesses, Lucero and Henan. As I
12 understand it, the plaintiff does not intend to
13 call Jeanie Kolh, so that part is moot.

14 Is that correct?

15 MR. HEENAN: That's correct, Your
16 Honor.

17 THE COURT: I will deal with
18 these together because these relate to the same
19 subject matter, and that is, JRL's conduct
20 against other punitive debtors.

21 Having looked at this, my intent
22 would be to deny this part of the motion. And
23 the reason for that is that the Supreme Court has
24 made clear that in the context of punitive
25 damages a proper consideration is the defendant's

1 conduct toward others. And in the *TXO v.*
2 *Alliance Resources Corporation* case, for example,
3 the Court specifically referred to the fact that
4 the team employed in that case was part of a
5 larger pattern and cited the *Hazlett* case, which
6 found that the existence and frequency of similar
7 past conduct was relevant.

8 More recently, the United States
9 Supreme Court in the *Philip Morris* case noted
10 that *Philip Morris* did not deny that the
11 plaintiff may show harm to others in order to
12 demonstrate reprehensibility, and the Supreme
13 Court agreed that that was proper for the
14 plaintiff to show harm to others in order to show
15 reprehensibility. So for those reasons, I think
16 that this evidence could be relevant. And as I
17 said, I presently believe the proper course would
18 be to deny that part of the motion.

19 That being said, and before I
20 hear from the parties, I want to make a couple of
21 other comments. Any evidence that is offered in
22 this regard has to be based on personal
23 knowledge. And I'm a little concerned because
24 testimony can't be based on speculation or
25 incomplete or conclusory data. There has to be a

1 connection between the data of which or the
2 information of which a witness is aware and
3 opinions.

4 For example, Mr. Eakin's expert
5 report talks about a cursory investigation. I
6 want to alert the plaintiff that I have real
7 concerns about a cursory investigation as basis
8 for testimony. And by the same token, with
9 respect to Ms. Henan and Mr. Lucero, while I'm
10 denying the motion, again, their testimony has to
11 be based specifically on their own knowledge.

12 And this is Mr. McCullough's case
13 we are trying, not other people's cases. I don't
14 want to hear a lot about other people's cases. I
15 don't think it's relevant. I think there are
16 some things that are relevant, as I identified in
17 cases of the United States Supreme Court, but I'm
18 not going to allow the case to get sidetracked on
19 the cases of others.

20 So that's my current thinking.
21 Does JRL want to be heard with respect to that?

22 MR. SIMPSON: Yes, Your Honor.
23 To the extent the Court finds the testimony
24 relevant with respect to the reprehensibility
25 analysis, it's our position that proof would only

1 come on during the latter phases of the trial, if
2 we ever get there. If the jury finds that
3 Johnson, Rodenburg & Lauinger acted with actual
4 malice, we then go to the phase of the trial
5 where the jury assesses the amount of the
6 punitive damages, and that's where we believe the
7 reprehensibility evidence, if that could be
8 construed as supporting that evidence, would come
9 in.

10 It should not, however, be used
11 to show that Johnson, Rodenburg & Lauinger acted
12 with malice towards Mr. McCullough because, as
13 the Court made clear in *State Farm v. Campbell*,
14 and *Williams v. Philip Morris*, the Court cannot
15 punish a defendant based on its conduct towards
16 others. This proof is only relevant, if at all,
17 in the latter half when the jury determines the
18 amount, not when they determine whether in fact
19 the defendant is liable for some malicious
20 conduct in the first place.

21 THE COURT: I think that's a
22 separate issue. But I have given thought to that
23 because you did mention that in briefing. I
24 don't think that's correct because I think that
25 this testimony, as I said, in the limited fashion

1 in which I envision it being relevant, is
2 relevant with respect to whether punitive damages
3 should be awarded at all with respect to malice,
4 the question of whether JRL knew there was a high
5 probability of damage or of harm to the
6 plaintiff. And I think what they have done in
7 other cases may inform that and be relevant to
8 that.

9 By the same token, I think you're
10 absolutely correct the Court has to be careful in
11 instructing to make certain the jury knows they
12 aren't to award damages for harm to others.
13 Because I think the Court has been very clear on
14 that.

15 But I think the second phase, as
16 the statute sets it out, is so that the jury
17 doesn't have a lot of testimony or any testimony
18 about the financial wherewithal of the defendant
19 and the things that are articulated in the
20 statute. So I think that's the purpose for the
21 second hearing. And so that's the way I would
22 intend to go on.

23 MR. SIMPSON: May I be heard on
24 one other point on this issue?

25 THE COURT: Of course.

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1 MR. SIMPSON: With respect to the
2 number of lawsuits that my client has filed in
3 Montana and perhaps the number of default
4 judgements it's taken and the number of lawsuits,
5 perhaps, that any one of the individual attorneys
6 has filed in a single day, I don't think that
7 evidence goes to reprehensibility or malice. In
8 fact, there's been no demonstration that that has
9 resulted in any kind of wrong to any other party,
10 and I'm not sure what evidence or what that
11 evidence would go to show.

12 Whereas Ms. Henan and Mr. Lucero
13 may purport to have direct knowledge of wrong
14 committed by my client against them, I don't
15 think the mere statistic that Charles Dendy has
16 filed so many lawsuits within this district
17 within the last 18 months goes to show any kind
18 of wrongful conduct whatsoever. And I believe
19 that information may be used to build passion and
20 prejudice against my client based on the fact
21 they sued a number of people that reside in
22 Montana.

23 THE COURT: Do you wish to
24 respond?

25 MR. HEENAN: Just briefly, Your

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1 Honor. I would also point out I failed to note
2 in our brief but did file a notice of
3 supplemental authority, one of the issues this
4 jury needs to determine in deciding statutory
5 damages under the Fair Debt Collection Practices
6 Act is the extent to which the noncompliance is
7 intentional. That is 15 U.S.C. 1692 (k)(b)(2).

8 As well as for a punitive damages
9 claim, as the Court has articulated, the
10 plaintiff has the burden of proving that the
11 defendant acted with an indifference to a high
12 probability of injury. 50 lawsuits a day would
13 constitute the filing of a lawsuit approximately
14 every eight minutes by these lawyers. It's part
15 of a business model that this law firm employs
16 that the evidence will demonstrate. They file a
17 large volume of lawsuits and know that there is a
18 very, very few limited amount of people that they
19 sue that are going to have the means or ability
20 to respond through counsel. When people respond
21 through counsel, they immediately dismiss and
22 everyone else they file a judgement against. I
23 think Your Honor has articulated the issue in the
24 pertinent Supreme Court case law and I hope you
25 follow what you said.

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1 THE COURT: I am going to deny
2 this. I think, in addition, this evidence with
3 respect to a number of lawsuits could be relevant
4 to a couple of other elements on the claims pled
5 here. One is the Unfair Trade Practices. That
6 cause of action concerns me a little because I
7 think that allowing a party who is sued to turn
8 around and bring a lawsuit against the opposing
9 party's counsel sets a dangerous precedent. And
10 I don't think, in the normal course, that the
11 provision of professional services would give
12 rise to this kind of claim, the Unfair Trade
13 Practices claim.

14 However, I have studied Montana's
15 cases which don't directly address this question
16 as well as cases from other courts around the
17 nation which have interpreted similar types of
18 statutes. And a distinction has been drawn
19 between provision of professional services to a
20 client and the type of conduct that is alleged
21 here, for example, that to which Mr. Heenan just
22 made reference, filing a lawsuit on average of
23 once every eight minutes.

24 And the distinction that other
25 state courts have drawn is between

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1 entrepreneurial and commercial activities of a
2 lawyer as opposed to the giving of professional
3 advice and professional services to a client. I
4 think that is a fact question which is why I
5 denied a motion for summary judgement on it.

6 But I think here there is
7 sufficient evidence that has been offered to
8 create an issue of fact as to whether this was
9 commercial and entrepreneurial activity by this
10 law firm as opposed to the provision of simple
11 professional legal services to a client in a more
12 typical sort of lawyer-client relationship.

13 So for those reasons, also, I
14 think under abuse of process where you have the
15 fact question that the Montana Supreme Court has
16 identified as to the ulterior purpose, that is,
17 using the suit as an instrument of coercion, I
18 think the evidence we are talking about now is
19 relevant to those factors. So for all of those
20 reasons, with the caution that I have given to
21 the plaintiff, I will deny the Items 2 and 3 of
22 the defendant's motion in limine.

23 Turning, then, to 4, which is
24 evidence of the prior lawsuit, my intent is to
25 deny that, again, for the reasons that we have

1 already talked about. I'm not certain, however,
2 how the plaintiff intends to bring this in. And
3 whether or not it's allowed will depend on how it
4 is offered.

5 Does the plaintiff presently
6 intend to offer this somehow, this evidence with
7 respect to the prior lawsuit under the Fair Debt
8 Collection Practices Act?

9 MR. HEENAN: To be honest, Your
10 Honor, I don't contemplate why I would need to
11 admit that evidence. It might become relevant
12 under cross-examination of the Johnson, Rodenburg
13 & Lauinger lawyers. I agree with the defendant
14 that it would constitute potentially 404-B
15 evidence and would ask the jury be given the
16 limited instruction if we delve into that issue.

17 THE COURT: I will deny it now,
18 but the defendant certainly can make objections
19 that it believes is proper at trial to any offer
20 of that evidence.

21 The 5th is Judge Fagg's letter to
22 Charles Denby. My intent here is to grant that
23 portion of the defendant's motion. That's
24 hearsay. I think it's prejudicial and only
25 marginally relevant if relevant at all. So as

1 stated, my intent is to grant that portion of the
2 motion.

3 Does the plaintiff wish to be
4 heard on that?

5 MR. HEENAN: Briefly, Your Honor.
6 The limited intent that we would rely on Judge
7 Fagg's letter, we wouldn't offer it as an exhibit
8 at trial, but I could foresee or want to
9 cross-examine Johnson, Rodenburg & Lauinger's
10 lawyer Denby with the fact that the judges in
11 Yellowstone County have a heightened scrutiny of
12 Johnson, Rodenburg & Lauinger filings, and
13 Johnson, Rodenburg & Lauinger knows that and the
14 judges here in Billings know that.

15 THE COURT: Does the defendant
16 wish to be heard?

17 MR. SIMPSON: I think that's just
18 an end run around the fact that the letter is
19 hearsay. I think just asking that question is
20 going to be prejudicial to our client.

21 Our client has no way of
22 effectively rebutting it other than to get into a
23 distended discussion of the circumstance under
24 which Judge Fagg wrote the letter and why my
25 client responded the way he did.

1 THE COURT: I think it could be
2 very confusing. As I read the letter and the
3 response, there was an issue with respect to
4 whether Mr. Denby actually received the answer.
5 And so if we started going into that, it's going
6 to get us sidetracked and risk confusing the jury
7 with respect to the merits of that little
8 controversy, which really doesn't have anything
9 to do with the facts that the jury has to
10 consider in this case.

11 And if you start, on behalf of
12 the plaintiff, start cross-examining these
13 lawyers on whether there is a heightened or
14 whether the judges in this county have been
15 cautioned with respect to that, then that's going
16 to force the defendants to get into this lengthy
17 explanation as to what happened and a question
18 about whether Judge Fagg did the appropriate
19 thing. And I just think it's so marginally
20 relevant and it really risks confusing the jury
21 and unduly wasting time. So I'm going to grant
22 that motion.

23 The sixth item in the motion in
24 limine is the fact that JRL has insurance
25 coverage. There is no objection to that. So

1 that will be granted.

2 And finally, the 7th and final
3 item is the film Maxed Out. That's moot because
4 the plaintiff intends not to offer that. So that
5 will be denied as moot.

6 Is there anything else that the
7 defendant has to raise with respect to the motion
8 in limine? Or does that address all the items of
9 concern?

10 MR. SIMPSON: I think the other
11 issues could wait until the final pretrial, Your
12 Honor.

13 THE COURT: Okay. Let's turn,
14 then, to the plaintiff's motion in limine which
15 is Court Document 102 filed on February 23.

16 The first item is the
17 availability of statutory attorneys' fees and
18 costs. There is no objection to that so that
19 will be granted. The second is the availability
20 of statutory trouble damages under the Unfair
21 Trade Practices Act. Again, that is not opposed
22 so that will be granted.

23 The third is any evidence
24 regarding June Tift or her claim. Again, there
25 is no objection and that will be granted.

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1 On 4, this seeks to preclude any
2 evidence that CACV is responsible for the
3 defendant's conduct. My intent is to deny this
4 because it's way too broad. Obviously the jury
5 is going to have to hear something about CACV so
6 how the Court would enforce such a motion in
7 limine, if granted, I'm not sure.

8 The defendant certainly can raise
9 objections at trial to any evidence that is
10 offered, or argument if the plaintiff feels that
11 it's inappropriate. But I think that that is
12 just way too broad and my intent is to deny it.

13 Does the plaintiff wish to be
14 heard further?

15 MR. HEENAN: Thank you, Your
16 Honor.

17 Briefly, I agree that we made
18 that motion too broad. The scope or the intended
19 scope was that CACV, they are not going to be on
20 the verdict form. We would object and ask that
21 counsel be cautioned prior to the impanelling of
22 the jury not to raise arguments that awards
23 should be reduced or somehow a percentage should
24 be attributed to CACV. That's the empty chair
25 defense, and that's what we were trying to reach.

1 THE COURT: I don't think the
2 defendant is arguing that, are you?

3 MR. SIMPSON: No, we are not.

4 THE COURT: I'm going to deny
5 that part.

6 The deadbeat defense is the next.
7 My intent here is also to deny this. Again, I'm
8 not sure exactly what all it includes after I
9 read the briefing. And again, if the plaintiff
10 feels that there is an appropriate objection to
11 any evidence or argument offered at trial, you
12 certainly can raise those. But my intent is to
13 deny this motion.

14 Do you wish to be heard?

15 MR. HEENAN: No, Your Honor,
16 other than I frankly agree with you.

17 THE COURT: Why did you file the
18 motion, then?

19 MR. HEENAN: I thought the motion
20 had merit, certainly, when I made it, and I had
21 the benefit of being supplied with some unusual
22 motions in limine and these types of FPCA cases.

23 The more I thought about it and
24 coming into court and getting read for today, I
25 suspected that was a loser. But I did prepare a

1 jury instruction reflecting that type of language
2 that I'm going to ask Your Honor to consider in
3 the final pretrial conference.

4 THE COURT: Okay. And the last
5 item in the plaintiff's motion is any attempt to
6 impeach or undercut the Court's prior orders. My
7 intent also is to deny this. I think it's vague.

8 And also, I don't expect there to
9 be any evidence or argument about the orders
10 because orders didn't relate to the state law
11 claims or to damages under the Fair Debt
12 Collection Practices Act, and that's what we are
13 trying. I also think it's unnecessary.

14 Again, if there is evidence or
15 arguments offered that the plaintiff feels are
16 improper at trial, proper objections can be made.
17 But my intent would be to deny the motion in
18 limine to that effect.

19 Do you wish to be heard?

20 MR. HEENAN: Briefly. One of the
21 exhibits that's been provided by Johnson,
22 Rodenburg & Lauinger is this 2002 card member
23 agreement that Johnson, Rodenburg & Lauinger also
24 supplied the Court as part of the summary
25 judgement motion practice. The Court made

1 findings of fact with respect to whether that
2 card member agreement had any foundation or was
3 admissible for consideration in a summary
4 judgement proceeding.

5 I have concerns that once the
6 door's open to the jury that there is this card
7 member agreement out there, even though we
8 strongly believe there is no evidence whatsoever
9 to link this card member agreement to my client
10 or show that it has anything to do with him, the
11 jury is going to be tainted and will think this
12 is somehow a procedural move instead of what it
13 is, and that's Johnson, Rodenburg & Lauinger
14 didn't have a card member agreement and they
15 asked for attorneys' fees anyway.

16 In that limited respect, I would
17 ask Your Honor to consider whether Johnson,
18 Rodenburg & Lauinger, whether it would be
19 appropriate for them to raise arguments about,
20 well, there was a card member agreement; here it
21 is.

22 THE COURT: I have two thoughts
23 with respect to that argument. But let me hear
24 from the defendants, first.

25 Do you want to respond?

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1 MR. SIMPSON: It's just limited
2 to the card member agreement. I think two
3 things, number one, Mr. Denby's and I believe Ms.
4 Lauinger's testimony at deposition was and will
5 be at trial with respect to the claim for
6 attorneys' fees, with very limited exception as
7 to I believe only one credit card issue, which
8 was not the credit card issue involved in this
9 case, every card member agreement they have ever
10 seen, and they have seen a few, contains
11 attorneys' fees clauses.

12 And I think that evidence is
13 relevant to rebut the exertion that including a
14 prayer for relief for \$481 in attorneys' fees was
15 somehow done intentionally to harm Mr.
16 McCullough. I think they are entitled to rebut
17 that assertion.

18 And when they were eventually
19 supplied with a card member agreement, that's the
20 one they were supplied with. Whether they can
21 demonstrate it was the correct one or the one
22 that applied to his claim, I think, as the Court
23 noted, is the question.

24 But given that my client is being
25 subject to a claim for punitive damages, I think

1 they are entitled to put on the proof to show why
2 they did what they did, even as the Court
3 determines violates the FDCPA.

4 THE COURT: I think there are two
5 things I would like to address. One is the card
6 member agreement itself -- no, I'm going to go
7 the other direction. The other item I had in
8 mind is the Fair Debt Collection Practices Act as
9 opposed to the state law claims that we're
10 trying. The Practices Act is basically a strict
11 liability statute unless bona fide error can be
12 shown. The state law claims are much different
13 than that. And the jury will have to make the
14 determination as to whether the elements of each
15 of those three causes of action have been met.

16 So I think, to the extent that
17 the defendants offer testimony as to why they did
18 what they did, I think they are permitted to do
19 that along the lines that Mr. Simpson was just
20 talking about, about why did you include a claim
21 for attorneys' fees? I think they can explain
22 that.

23 On the other hand, turning to the
24 second item, which is a card member agreement,
25 offering that into evidence, some showing is

1 going to have to be made that it is relevant to
2 the case. As I recall, that was dated 2002, long
3 after this man got his credit card and several
4 years after he made his last payment. So I just
5 don't know how you're going to argue that it's
6 relevant to this case, or that it somehow
7 informed what the defendants did in this case. I
8 think there are two questions about that and one
9 of them arguably is relevant here.

10 And I don't think that, for the
11 reasons that I explained with respect to the Fair
12 Debt Collection Practices Act, that some of the
13 findings that the Court made in ruling on summary
14 judgement on the Fair Debt Collection Practices
15 Act are different questions than the jury has to
16 address on the state law claims, and are not
17 binding on the jury because they are different
18 legal questions.

19 So I'm going to deny Number 6 of
20 the plaintiff's motion in limine.

21 Is there anything else in the
22 plaintiff's motion in limine that we should
23 address at this time? Or have we fully addressed
24 all parts of the motion, Mr. Heenan?

25 MR. HEENAN: We addressed all

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1 parts of the motion.

2 MR. SIMPSON: May I raise one
3 other issue at this point? Just a question.

4 THE COURT: Yes.

5 MR. SIMPSON: I'm not sure if the
6 Court wants to address this now, it's under Legal
7 Issues in the pretrial order, that subpart Roman
8 Numeral VIII. And part one of that, I don't know
9 if perhaps we should address this as motion in
10 limine, but the issue that I've raised is whether
11 the plaintiff should be able to present to the
12 jury a specific demand for dollar amounts for the
13 various items of damage that he is claiming in
14 this case.

15 The grounds for my motion is that
16 through the preliminary pretrial statement and
17 the discovery responses, the plaintiff did not
18 provide any specific number for any category of
19 damage. If he did, Mr. Heenan will correct me,
20 but my search, when we were putting the pretrial
21 order together, led me to believe that numbers
22 were not given until we got to the final pretrial
23 order, and I believe that is an issue of
24 surprise. I don't know if the Court would like
25 to address that now or wait for the pretrial, but

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1 I wanted to throw that out there, since it's
2 going to exclusion of evidence.

3 THE COURT: I think we can talk
4 about that further at the final pretrial
5 conference, which will begin shortly. I will say
6 just generally that if evidence was sought and
7 not produced, it's not coming in.

8 On the other hand, I don't think
9 there is any kind of general prescription from
10 the plaintiff asking for damages. So until I
11 hear the context of the objection, it's pretty
12 tough for me to rule. But we can talk about that
13 further.

14 MR. SIMPSON: Thank you.

15 THE COURT: Let's take a short
16 recess.

17 MR. HEENAN: Judge, can we raise
18 the issue of the settlement agreement in the
19 final pretrial conference as well?

20 THE COURT: Certainly. And we
21 will have our court reporter there. So if we
22 need to ask her, we won't make a record of the
23 whole final pretrial conference, but if we need
24 to make a record, either lawyer at any time can
25 ask that a record be made.

1 We will take a short recess and
2 regroup in our conference room.

3 (Brief recess.)

4 THE COURT: We are now looking at
5 the plaintiff's witness list, the plaintiff's
6 will call witness list, and talking about the
7 presentation of portions of the video deposition
8 of Charles Dendy. There are objections that are
9 listed by the defendant to portions of that video
10 deposition.

11 My question to the defendant is,
12 given the Court's rulings this morning with
13 respect to the defendant's motion in limine, are
14 there any remaining objections to the designated
15 excerpts of Charles Dendy's video deposition?

16 MR. HEENAN: I'm sorry. This
17 list they supplied, they changed the -- oh, I'm
18 sorry. They limited on objections. I'm sorry.

19 MR. SIMPSON: I think our first
20 objection to page eight line two, through page 10
21 line 10 was resolved by the Court's order on our
22 motion in limine. Our objection on the testimony
23 at page 19, lines 11 through 15, I think that
24 still stands. That may simply be a mistake on
25 the way it was designated.

1 THE COURT: I don't have his
2 deposition.

3 MR. SIMPSON: I do. It simply
4 cuts off halfway through Mr. Dendy's answer.

5 MR. HEENAN: That's a mistake on
6 my part, Your Honor. I meant to do 20 through
7 15.

8 THE COURT: Fifteen through 18?

9 MR. HEENAN: 19/11 through 20/14.

10 THE COURT: Through 20 what?

11 MR. HEENAN: Through 20/14.

12 THE COURT: 19 line 11, through
13 20 line what?

14 MR. HEENAN: Well, for -- I don't
15 know why that is. Because then, to look at it,
16 then it starts off again on 21 and goes through
17 27/16. So I guess it's easier to say 19/11
18 through 27/16.

19 THE COURT: Through 27/16?

20 MR. HEENAN: Correct, Your Honor.

21 THE COURT: Is there any
22 objection to that?

23 MR. SIMPSON: Perhaps we could
24 take a short break to read -- well, I stated an
25 objection already, at page 25 line 22, through

1 page 26 line five on the grounds of relevance.

2 THE COURT: Why don't we do this.
3 Let's go off the record for a minute.

4 (Discussion off the record.)

5 (Brief recess.)

6 MR. SIMPSON: I think we've
7 sorted through the typographical questions we
8 had. I think the record's clear, John is now
9 designating for Mr. Dendy to start at page 19
10 line 11 and go through page 27 line 16.

11 THE COURT: 19 line 11 and go
12 through what?

13 MR. SIMPSON: Page 27 line 16.
14 That resolves the objection that I had that there
15 was an incomplete answer where the designation
16 only ended halfway through.

17 I still, however, wanted to put
18 on the record our objection to the question and
19 answer at page 25 line 22, through page 26 line 5
20 on the grounds of relevance. It's a question
21 about the practices of Portfolio Recovery
22 Associates and Portfolio is not a party to the
23 case and their conduct isn't at issue here.

24 THE COURT: No, but Mr. Dendy's
25 is. Does it have anything to do with that?

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1 MR. SIMPSON: I don't believe so.

2 THE COURT: Can I see the
3 testimony? All right. We are on page 25 through
4 26 line 5. That doesn't seem relevant to me.

5 What is your argument, Mr.
6 Heenan?

7 MR. HEENAN: Portfolio Recovery
8 Associates along with CACV and another company
9 called Unifund are all three of the biggest debt
10 buyers and three of Johnson Rodenburg's largest
11 clients. It's my understanding that in this
12 industry, by contract, when the debt buyers
13 purchase these accounts they agree contractually
14 they won't get any evidence at all, and won't ask
15 for evidence.

16 THE COURT: The debt buyers agree
17 to that?

18 MR. HEENAN: Correct. So the
19 debt buyers need attorneys like Johnson Rodenburg
20 that are willing to file lawsuits without
21 requiring any evidence.

22 THE COURT: This says they are
23 limited to how many times they can ask for
24 information. That's different from what you just
25 said.

1 MR. HEENAN: We withdraw the
2 question.

3 THE COURT: So then I will grant
4 the objection to the showing of the video
5 deposition of Dendy from page 25 line 22, through
6 page 26 line 5.

7 Any further objections?

8 MR. SIMPSON: Yes, page 32 line
9 11 through line 24, and our objection is
10 relevance. And the Court's already ruled on the
11 issue.

12 THE COURT: Actually I think
13 you --

14 MR. SIMPSON: Maybe I'll consider
15 withdrawing that objection. We withdraw it.

16 THE COURT: The objection to the
17 testimony on page 33 is withdrawn. And --

18 MR. SIMPSON: One other, page 43
19 line 15, through page 44 line 18. This goes to
20 the question of requests for admission. We don't
21 believe that's relevant and I believe it asks for
22 a legal conclusion.

23 THE COURT: Through 44 line 18?

24 MR. SIMPSON: Yes.

25 THE COURT: I'm going to overrule

1 that objection and allow the plaintiff to show
2 page 43 lines 15, to 44 -- I'm sorry. From page
3 43 line 15, through page 44 line 18. I think
4 it's relevant to a variety of issues the jury
5 will have to decide.

6 Okay. Grace Lauinger, also, the
7 plaintiff intends to call by video deposition.
8 Is there any remaining objection to the
9 designated excerpts?

10 MR. SIMPSON: Yes, we have a
11 couple at page 30 line 25, through page 31 line
12 9. This has probably already been addressed by
13 the Court's order on our motion in limine on the
14 number of lawsuits filed in a day. This actually
15 goes to a number of demand letters sent out in a
16 day. I wanted to maintain our objection for the
17 record.

18 MR. HEENAN: It should be 30/20
19 through 31/9. Sorry.

20 THE COURT: So you're amending
21 your designation to page 30 line 20, through
22 31/9?

23 MR. HEENAN: Correct, Your Honor.

24 THE COURT: Yes, I think we
25 already addressed that. So I will overrule that

1 objection.

2 MR. SIMPSON: I have one other to
3 Grace Lauinger, and that's to the testimony at
4 page 52 starting at line 19, ending at line 25.
5 And our objection there is relevance. And this
6 is the same issue, how many accounts is Ms.
7 Lauinger handling, and that's the relevance
8 objection in the motion in limine.

9 THE COURT: For the same reasons,
10 I will overrule that.

11 Moving on to Lisa Lauinger. Any
12 remaining objections to the designated excerpts
13 of Lisa Lauinger?

14 MR. SIMPSON: There are, Your
15 Honor. Starting at page 38, lines 4 through 23.
16 This goes, again, to the question of what
17 percentage of suits result in default judgements,
18 how many people in the lawsuits that you file
19 retain counsel, and that sort of thing. Again,
20 that's our relevancy objection.

21 THE COURT: The excerpt is
22 through 23? I will overrule that objection.

23 MR. SIMPSON: Hold on. Yes.
24 Through -- correct.

25 And then page 40 line 13, the

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1 question beginning at line 13, What does Johnson
2 Rodenburg do in an attempt to collect on
3 judgements against people in Montana? It
4 discusses debtor examinations. Our objection
5 runs through page 43 line 5. I don't believe
6 that evidence is relevant because there isn't any
7 similarity to the circumstances here because
8 Johnson, Rodenburg & Lauinger never obtained a
9 default judgement and never put Mr. McCullough
10 through debtor examination. So I don't believe
11 this testimony is relevant. It's not similar to
12 the conduct at issue here.

13 THE COURT: Doesn't it go to
14 motive and profitability of the conduct that's at
15 issue?

16 MR. SIMPSON: I guess, but
17 there's been no showing that the conduct in those
18 other cases is wrongful. I think it's the mere
19 implication that by filing the lawsuits and
20 taking default judgements, which is the lawful
21 process, that my client is doing something wrong.
22 And that implication is harmful without my client
23 having --

24 THE COURT: Again, that's for the
25 jury to decide based on the evidence that I

1 understand the plaintiff intends to present, that
2 they didn't have any information to know whether
3 they were legitimate suits or not.

4 Now, I don't know if that's what
5 the evidence will show, but that would be
6 consistent with what the plaintiff is arguing
7 here.

8 So I think that's a jury
9 question. So I will overrule that objection.

10 MR. SIMPSON: Then the final one
11 for Lisa Lauinger is page 50, line 7 through 19.
12 And this is the same issue we just discussed,
13 what's the number of lawsuits that you filed in a
14 day.

15 THE COURT: Okay. For the same
16 reason, I overrule that objection.

17 Then moving to McElhinney.

18 MR. SIMPSON: Our primary
19 objection to Dr. McElhinney's deposition being
20 used is that Dr. McElhinney works and resides in
21 Billings and is within the Court's subpoena
22 power. And he is not, to our knowledge,
23 unavailable to testify, and we in fact intend to
24 call him during our case in chief.

25 We have other specific objections

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1 if the Court wants to hear those, but I think the
2 primary objection might moot the other ones until
3 he is actually called.

4 THE COURT: How are you permitted
5 to use the deposition under the rules if he is
6 available?

7 MR. HEENAN: A deposition can be
8 used for any purpose is my understanding. So we
9 took his deposition. And I think I'm entitled to
10 call Dr. McElhinney by deposition in our case in
11 chief.

12 THE COURT: Cite me the rule.
13 Would you get my rule book?

14 MR. SIMPSON: We have one right
15 here. Lauinger.

16 MR. HEENAN: 32-A.

17 THE COURT: 32-A what?

18 MR. HEENAN: Good question. I
19 don't know. I don't know. I can't cite to
20 anything.

21 THE COURT: Okay. Then I will
22 sustain that objection.

23 Okay. Kerri Henan and Ken
24 Lucero. Do you have any questions, Mr. Heenan,
25 about the cautions I expressed with respect to

1 their testimony?

2 MR. HEENAN: No, Your Honor. I
3 take them to heart and I only intend to illicit
4 extremely narrow questions that are relevant to
5 the -- that have a nexus with what occurred to
6 Mr. McCullough.

7 THE COURT: Who's Bob Dunker?

8 MR. SIMPSON: We have listed
9 parts of his testimony too.

10 THE COURT: I saw that.

11 MR. SIMPSON: He is the
12 representative of CACV of Colorado.

13 THE COURT: So the plaintiff has
14 designated excerpts of his deposition.

15 Are there any remaining
16 objections that the defendant has to the use of
17 those excerpts at trial?

18 MR. SIMPSON: Yes. Page 53 line
19 14, through page 54 line 5. The first question,
20 page 53 line 14, Question, Does CACV more often
21 than not cover default judgements and lawsuits it
22 files in Montana? I don't know.

23 And then he's got some
24 approximations or speculations as to whether most
25 of them result in default judgements. And how

1 often do people CACV suits appear through counsel
2 or pro se?

3 I don't think it's relevant to
4 the issues in the case. Perhaps the Court
5 already addressed that through our motion in
6 limine as well.

7 THE COURT: Give me a moment to
8 read it.

9 Mr. Heenan, what difference does
10 it make if CACV condones or tolerates its lawyers
11 prosecuting lawsuits not allowed? What issue
12 does that go to here? Talking about page 55
13 lines 5 through 8. Does it matter -- page 55
14 lines 5 through 8.

15 MR. HEENAN: Well, that leads
16 into, Your Honor, the next objection, which is
17 page 59. Basically long story short, CACV tells
18 Johnson Rodenburg, We made a mistake. That
19 wasn't was an unused cost. Johnson Rodenburg
20 propounds those requests for admission and then
21 drafts up an affidavit for CACV to sign so they
22 can proceed with summary judgement against Mr.
23 McCullough.

24 THE COURT: How is that not
25 relevant, then?

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1 MR. SIMPSON: Nobody ever signed
2 the affidavit.

3 THE COURT: But if your client
4 prepared it for them --

5 MR. SIMPSON: Our client prepared
6 it for them, but as Mr. Dendy will testify, Mr.
7 Dendy, when the information was in the file,
8 overlooked the information about the return of
9 unused costs not actually being the payment.

10 This is, if you will, the
11 explanation as to why the requests for admission
12 were served and why he only found out directly
13 when he spoke to a client representative in
14 December of 2007 and was told, look -- that's
15 when he first learned subjectively, we are not
16 within the statute of limitations.

17 At that point he has a discussion
18 with his client. The client says, Dismiss the
19 case.

20 Up until then, I think, in a
21 general sense, what does CACV condone in its
22 lawyers isn't really relevant. That's not the
23 question. The question is, what did our client
24 know and when did our client know it?

25 MR. BOHYER: The other thing I

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1 would add to that, Your Honor, with respect to an
2 affidavit that is prepared and not filed or
3 executed, that's not abuse of process.

4 THE COURT: No, but it may be
5 malice. It may be disregard or it may tend to
6 show disregard for a high probability of injury.
7 Because, as I understand what the facts may show
8 here, although Mr. Dendy subjectively will
9 testify that he didn't know, there were two
10 things in his file that, had he properly
11 investigated, the jury could find that he would
12 have known, maybe three. The prior lawsuit
13 which, as I understand it in this software
14 program, there was something in there about the
15 prior lawsuit that was dismissed. As I
16 understand, he made no investigation to see what
17 that was about.

18 The answer, where the
19 plaintiff -- excuse me. The plaintiff here the
20 defendant there -- answered and said, I haven't
21 made a payment here for eight years, or whatever.
22 As I understand it, I don't know what the
23 evidence will show, but from the evidence I saw
24 in the motion, he made no effort to investigate
25 that; and then the snafu or whatever it is

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1 between Grace Lauinger and him, where the law
2 firm knew for months, and he did nothing.

3 So what I'm saying is, isn't,
4 then, the fact that with all that stuff in the
5 file Dendy, or whoever on his behalf, drafts an
6 affidavit for CACV to sign, containing
7 information that had he investigated any one of
8 those things he probably would have known? So
9 the jury arguably could conclude from that
10 evidence that he acted completely disregarding
11 the high probability of injury to this plaintiff.

12 MR. BOHYER: But if the document
13 is neither unsigned nor filed, how is that
14 evidence of either the abuse of process or the
15 actual prosecution?

16 THE COURT: I don't know that it
17 is. But if the jury on other evidence finds
18 either an Unfair Trade Practice, malicious
19 prosecution or an abuse of process, it goes to
20 the question of whether the jury should award
21 punitive damages.

22 MR. BOHYER: It's akin, is it
23 not, to preparing a draft of a document that you
24 later retract?

25 I don't see how that can sustain

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1 even evidence of malice or repeated conduct if
2 the document is not executed by the client and
3 the lawyer does not take the next step of placing
4 the process with the Court. The process hasn't
5 been abused.

6 MR. HEENAN: If I might respond
7 briefly, Your Honor.

8 THE COURT: You may.

9 MR. HEENAN: We wouldn't be
10 submitting the draft affidavit to show an abuse
11 of a process but rather the intent of this law
12 firm for what they had in store for Mr.
13 McCullough next until he appeared through
14 counsel.

15 THE COURT: Okay. I'm going to
16 overrule the objections.

17 Although, Mr. Heenan, with
18 respect to what CACV condones, is it -- let me
19 see if I understand here. You contend that's --
20 let me ask. Does the evidence show or will the
21 evidence show that Dendy presented this to CACV?
22 What did he do with the affidavit?

23 Let me ask this. Will the
24 evidence show that he drafted this affidavit?

25 MR. SIMPSON: He or somebody in

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1 his firm. It was in their file.

2 THE COURT: Will he testify that
3 he did it?

4 MR. SIMPSON: I would have to ask
5 him. I don't recall.

6 THE COURT: He or somebody.

7 MR. SIMPSON: He or somebody at
8 his direction drafted it.

9 THE COURT: Is there any evidence
10 that he or somebody at his direction sent it to
11 CACV?

12 MR. SIMPSON: That's what I'm not
13 sure about. I don't believe so. I don't think
14 it was in Mr. Dunker's file. I may stand
15 corrected on that point later, but I don't
16 believe it was presented to CACV because our
17 client, as part of the process, did serve the
18 discovery requests to Mr. McCullough and, as I
19 understand it, was waiting to receive the
20 responses back before proceeding with the motion
21 for summary judgement.

22 So they have things in the works
23 in the draft stage, but they are not ready to go
24 for filing the motion, supporting brief and
25 supporting affidavit because they don't have the

1 responses back.

2 By the time they get the
3 responses back, shortly thereafter they talk to
4 their client again, the client rep at CACV, and
5 that's when it clicks that this case is
6 definitely outside the statute of limitations,
7 dismiss it right now.

8 THE COURT: We are not talking
9 about whether the affidavit is relevant. We are
10 talking about CACV.

11 And so, Mr. Heenan, if there is
12 no evidence that this affidavit was ever
13 submitted to CACV, then what relevance does it --
14 what difference does it make to any determination
15 the jury has to make what CV condones or
16 tolerates? I'm missing the connection.

17 MR. HEENAN: As I understand what
18 Johnson Rodenburg's defense is, we rely
19 completely on our client. Well, the client here,
20 CACV says, No, by contract we tell the lawyers to
21 independently investigate whether it's proper to
22 file suit.

23 That's directly what this line of
24 questioning goes to. Does CACV condone or
25 tolerate its lawyers prosecuting lawsuits not

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1 allowed? Absolutely not.

2 THE COURT: Excuse me for
3 interrupting. Let me ask the defendant, then.

4 As I understand it, Mr. Heenan is
5 correct that part of the defense here is that
6 these lawyers can rely on CACV. Is that correct?

7 MR. BOHYER: Certainly. It's
8 part of our case that our client, as with any
9 lawyer, our client relied on what the client told
10 them.

11 THE COURT: Then I will overrule
12 the objection.

13 MR. SIMPSON: Just to be clear,
14 the record on the affidavit, Mr. Heenan had
15 labeled the affidavit as Exhibit 71. I then
16 followed up and asked Mr. Dunker, Have you seen
17 71 before? He answered, I've seen something like
18 it, but I don't have any remembrance of seeing
19 this particular one.

20 And I asked, did you ever sign an
21 affidavit on Mr. McCullough's account that you
22 are aware of? And he says, I don't remember.

23 THE COURT: So let's go on, then,
24 to the next objection, which is 54 starting at
25 line 11. Is that correct?

1 MR. SIMPSON: Correct, through 55
2 line 4. Our objection is it calls for a legal
3 conclusion to the extent Mr. Dunker is being
4 asked what obligations Johnson Rodenburg has when
5 a file is sent to it for service.

6 THE COURT: That does call for a
7 legal conclusion and an objection was properly
8 made. So I'm going to sustain that.

9 The thing is, as he answered it,
10 he answers it with respect to CACV, but the
11 question is, does it call for a legal conclusion?
12 I don't see that you followed up or you amended
13 your question in any way to ask a proper
14 question.

15 So I'm going to sustain the
16 objection and exclude page 54 line 11, through 55
17 line 4.

18 Okay.

19 MR. SIMPSON: One last one, Your
20 Honor. That is at page 61 starting at line 3
21 through line 18. And our objections are
22 relevance, more prejudicial than probative, and I
23 also stated in argument on the record that the
24 question was argumentative. In particular, the
25 phraseology that somebody at Johnson Rodenburg

1 knew the information to be false.

2 THE COURT: Isn't that a disputed
3 fact, Mr. Heenan?

4 MR. HEENAN: I don't think so,
5 Your Honor. Your Honor resolved that with
6 respect to the Fair Debt Collection Practices
7 Act, claiming Johnson Rodenburg, there was
8 evidence in its files that it was a time-barred
9 claim.

10 THE COURT: That's totally
11 different. Because that's not the issue that
12 this jury is going to decide. They aren't trying
13 the Fair Debt Collection Practices Act. They are
14 deciding the state law claims. And the
15 knowledge, the subjective knowledge, particularly
16 with respect to your claim for punitive damages
17 and having to prove actual malice, is very
18 important.

19 So you can argue that Johnson
20 Rodenburg knew or had reason to know, or should
21 have known had they acted properly, that it was
22 false. But that's not your question. You said
23 that they knew. You didn't add 'or should have
24 known' was false. And so I think that that
25 assumes facts that are disputed or not in

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1 evidence, that they knew that it was false, the
2 lawyer that prepared that affidavit. Is that
3 correct?

4 MR. HEENAN: Bear with me just a
5 minute, Your Honor.

6 Material facts which were
7 established by the Court in its November order by
8 August 6, 2007, JRL had information from its
9 client demonstrating that the lawsuit was
10 time-barred.

11 THE COURT: That's right. But
12 what you have is that these attorneys knew that
13 it was false. The fact that they had information
14 in their files goes to that issue of whether they
15 should have known that it was false had they
16 properly investigated. But that doesn't say that
17 they knew, that these lawyers knew that this was
18 false. That's what your question asked.

19 MR. HEENAN: I understand your
20 point, Your Honor.

21 THE COURT: So I'm going to
22 sustain that objection and preclude the offering,
23 then, of 61 line 3 through line 18.

24 Okay. Now, have you decided
25 whether you're going to -- let me give you this

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1 back.

2 MR. HEENAN: You might still need
3 it, Your Honor, because we raised our own
4 objections.

5 THE COURT: With respect to the
6 may call, have you determined whether you're
7 going to call any of those? What's the current
8 status on that?

9 MR. HEENAN: I think they are
10 both may calls, Your Honor.

11 THE COURT: When you say "both,"
12 I have four on my list.

13 MR. HEENAN: Mrs. McCullough and
14 Dr. Veraldi. I do still intend to call Dr.
15 Veraldi. I'm not sure about Mrs. McCullough.

16 THE COURT: You moved Mike Eakin
17 and Ken Lucero to the will call list.

18 Let's go, then, to the
19 defendant's will call.

20 The defendants currently intend
21 to call four witnesses, three live, one through
22 video. There is no objection to the designated
23 excerpt of Mr. Dunker.

24 MR. HEENAN: There is. I was
25 supplied with this this morning and didn't have

1 an opportunity to lodge my objection. So if we
2 could do that, I would like to do that now.

3 THE COURT: Why didn't he get
4 them? Because I think we got them.

5 MR. SIMPSON: It was our intent
6 that he have those.

7 MR. HEENAN: There were several
8 different versions that all kind of came through,
9 and the last one that I had had, like one line
10 5/15 through 6/15 and 7/11 through 9/07, and we
11 had no objections to those.

12 LAW CLERK: That's what I have
13 now.

14 MR. HEENAN: I have no objections
15 to those. But there is a newer version.

16 LAW CLERK: That's the one I
17 don't have.

18 MR. SIMPSON: This is the one
19 that should have been filed with the pretrial
20 order.

21 THE COURT: This makes me cranky.
22 And a crankier judge would say, Tough. You don't
23 get to do it.

24 I won't do it, but I do want to
25 implore counsel, it is so important to exchange

1 these lists ahead of time. These already take
2 hours. We don't need to cause it to be twice the
3 amount of time because they haven't been
4 exchanged. When you come in with new excerpts,
5 that forces the other party to have to take time
6 here with the clerk and the court reporter and my
7 time, and it takes everybody's time, then. And
8 it's just not the most efficient way to proceed,
9 which is why the local rules and the order
10 require these things to be exchanged and provide
11 that if they are not, and if objections aren't
12 made to what is designated, that's it.

13 So did you get, Mr. Heenan, this
14 list, that is the first time I've seen it, with
15 all these exhibits and designations?

16 MR. HEENAN: It was e-mailed to
17 me this morning. And there was, to be fair to
18 defense counsel, preparing the final pretrial
19 order, there was a lot of back and forth, here's
20 the latest, and we went back through and looked
21 at all the e-mails. And to my knowledge, that
22 was the first time this morning we got this
23 document. But we wouldn't certainly stand on any
24 objection that it's untimely.

25 THE COURT: You're going to waive

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1 any objections that you have to these exhibits?

2 MR. HEENAN: No, I would like to
3 preserve my objections, but I mean the two
4 portions designated that I was aware of we didn't
5 have any objection to. But I wouldn't try to
6 push the issue of that's all they get to
7 introduce.

8 THE COURT: Well, there are 15
9 more. And I want to get them resolved now
10 because I want whoever is going to edit the video
11 to be able to edit it properly so we don't have
12 all of us and the jury sitting there.

13 We will keep going. As I said, I
14 have a criminal matter at two and I suspect it
15 might not be done by two, but you can resolve
16 those issues.

17 MR. HEENAN: I looked at it
18 during the break, so I'm ready to go on it. I
19 looked at it during the break. When they were
20 going through Dr. McElhinney, I used that time to
21 be able --

22 THE COURT: I didn't hear that.
23 I was busy being cranky.

24 MR. BOHYER: I would like to
25 thank the Court for your indulgence.

1 THE COURT: Do you have any
2 objections to any of these?

3 MR. HEENAN: Yes, Your Honor,
4 page 9 line 24.

5 THE COURT: I need a copy. Nine
6 line 24?

7 MR. HEENAN: You have to bear
8 with me a little bit, Your Honor, because I won't
9 have the copy in front of me.

10 9/24 through page 11 line 8.
11 Rule 602, personal knowledge, foundation, hearsay
12 and relevance.

13 THE COURT: Through what line?

14 MR. BOHYER: 11 line 8.

15 THE COURT: There's not a time
16 frame here. Where does it start?

17 MR. HEENAN: Page 9 line 24, Your
18 Honor.

19 THE COURT: Your first objection
20 was lack of knowledge. He seems to know. He
21 says, Did they purchase it? And he says, Yes.

22 MR. HEENAN: Specifically with
23 respect to this exhibit, he has no personal
24 knowledge of the exhibit.

25 I'm really sorry to do this, but

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1 would it be okay to make a copy of that
2 deposition? Because I highlighted some. Is that
3 all right if I run down to the clerk's office?

4 MR. SIMPSON: Here.

5 THE COURT: Go ahead and keep it.

6 The question is, Can you identify
7 the document? And he says, Yes. And then the
8 question is, And what this document is is proof
9 that CACV purchased Mr. McCullough's debt. And
10 he says, That's correct.

11 So what's the objection again?

12 MR. HEENAN: Bear with me just a
13 second, please;

14 This is the assignment agreement,
15 page 49 line 18, my questioning regarding it: Do
16 you personally know Cindy Bergener, who is the
17 affiant? No, I don't. Have you ever had other
18 occasions to see affidavits from Cindy Bergener?
19 I don't remember.

20 This is an affidavit between
21 someone else at Johnson Rodenburg and someone at
22 Chase Manhattan. This witness had no personal
23 knowledge about --

24 THE COURT: I thought Exhibit 66
25 was the sale document itself, transferring the

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1 asset.

2 MR. SIMPSON: I believe it is.

3 MR. HEENAN: It is.

4 MR. SIMPSON: CACV and Chase
5 Manhattan, not Johnson Rodenburg and Chase
6 Manhattan.

7 THE COURT: Is Exhibit 66 an
8 offered exhibit here?

9 MR. HEENAN: By the defendant,
10 and we raised the same objections.

11 THE COURT: What is the exhibit
12 number?

13 MR. HEENAN: Exhibit 66.

14 THE COURT: Oh, of course.
15 That's what the rule requires. But I don't have
16 Exhibit 66 in the defendant's. I go from 55 to
17 70 in the defendant's exhibits.

18 Mr. Simpson, did you offer this
19 one?

20 MR. SIMPSON: It's 506, the
21 affidavit of sale.

22 THE COURT: Why does it have a
23 different exhibit number?

24 MR. SIMPSON: It was produced in
25 different forums.

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1 THE COURT: I see.

2 MR. HEENAN: If I may, Exhibit
3 506 is only some portion.

4 THE COURT: 505. Oh.

5 MR. HEENAN: It references a
6 contract that is not part of the exhibit. And so
7 it's not the entire document, or what's
8 represented to be the entire document.

9 MR. SIMPSON: 505 is the bill of
10 sale and then the affidavit of sale is 506.

11 THE COURT: The testimony that we
12 are discussing to which objection has been made
13 is the question to Mr. Dunker of Exhibit 66,
14 which I'm told is the same as defendant's offered
15 Exhibit 506.

16 MR. BOHYER: Correct.

17 THE COURT: Is that correct so
18 far?

19 MR. SIMPSON: Yes.

20 THE COURT: And all Exhibit 506
21 is is a one-page affidavit of sale. The affiant
22 is Cindy Bergener and she signed it on August 31,
23 2007. And I'm now informed that Mr. Dunker has
24 testified in this same deposition that he doesn't
25 know who Ms. Bergener is. Was that it? Or

1 doesn't know her?

2 MR. HEENAN: If I may, Your
3 Honor, page 51, my question to Mr. Dunker:

4 Q. As I understand your testimony, Mr.
5 McCullough's account was apparently purchased
6 prior to your employment at Collect America.

7 A. That is correct.

8 Q. So you don't have any personal
9 knowledge of that purchase?

10 A. No.

11 Q. Do you know who at Collect America
12 would have personal knowledge of that purchase?

13 A. I don't know off the top of my
14 head.

15 Q. Do you have any -- have you ever
16 worked at Chase Manhattan Bank?

17 A. No, I have not.

18 THE COURT: Okay. It appears to
19 me this witness has no personal knowledge of
20 this, so I sustain the objection.

21 Does the defendant want to be
22 heard?

23 MR. SIMPSON: It's a document
24 maintained by CACV and it was transmitted by CACV
25 to Johnson Rodenburg and was part of CACV's file
on Mr. McCullough's credit card account. This

1 was part of the information that ultimately ends
2 up in my client's file.

3 And I think, if my client is
4 going to be subject to a claim of abuse of
5 process and malicious prosecution, it needs to
6 say, Here are the documents we ultimately
7 received during our work on this case. And I
8 think they would say they would routinely rely on
9 the documents provided by their clients.

10 THE COURT: Who is Mr. Dunker?
11 What is his position?

12 MR. SIMPSON: He is a legal
13 franchise specialist with CACV of Colorado.

14 MR. HEENAN: If I might, Your
15 Honor. Page 52 and 53 further builds:

16 Q. Is it fair to say you don't have any
17 personal knowledge of Chase Manhattan documents
18 regarding Mr. McCullough?

19 A. I don't think that's correct. They
20 provide documents to us I've reviewed.

21 Q. My question is, do you have personal
22 knowledge -- I mean, do you know what documents
23 Chase Manhattan would have provided to Mr.
24 McCullough?

25 A. I don't know what they provided.

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1 Q. Do you have personal knowledge of what
2 documentation was provided by Chase Manhattan to
3 Mr. McCullough with respect to this account?

4 A. No.

5 Q. Do you have personal knowledge as to
6 how Chase Manhattan maintained documents
7 regarding Mr. McCullough's account?

8 A. No, I don't.

9 THE COURT: Well, Mr. Simpson, if
10 there's a proper foundation and it comes in
11 through a witness with knowledge, I understand
12 your argument and would agree with it. But it
13 has to have a foundation and has to come in
14 through somebody who has knowledge of it.

15 And this witness, in your
16 designated excerpt, has offered testimony that,
17 based on what Mr. Heenan has read from subsequent
18 pages in the deposition, demonstrates he has no
19 personal knowledge of it. The question wasn't
20 whether this is a document that is regularly kept
21 in the course of business or any of that kind of
22 thing.

23 I assume this document found its
24 way into JRL's file. Is that correct?

25 MR. BOHYER: That is correct.

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1 THE COURT: Maybe you can get it
2 in through somebody that it's a part of their
3 records. But I'm not going to allow a witness
4 who has no knowledge of it to testify about it.

5 So I'm going to sustain the
6 objection to --

7 MR. BOHYER: We can put it in
8 through one of JRL's witness. We will go about
9 it that way.

10 THE COURT: I sustain the
11 objection to page 9 line 24, through page 10 --
12 no, through 11 line 8.

13 Okay. Any other objections to
14 excerpts?

15 MR. HEENAN: Yes, Your Honor.
16 Page 24 line 25, through page 25 line 4.

17 THE COURT: What is the
18 objection?

19 MR. HEENAN: Objection, hearsay,
20 602. The question is, Do you have any
21 understanding as to whether the card member
22 agreement between Mr. McCullough and Chase
23 Manhattan that was in effect in this case
24 provided for attorneys' fees? Answer, I believe
25 it did.

1 THE COURT: 24 line 13.

2 MR. SIMPSON: His objection
3 starts at line 25, I think.

4 MR. BOHYER: Yes, page 24 line
5 25.

6 MR. HEENAN: The question starts
7 at page 24.

8 THE COURT: I'm going to sustain
9 that objection.

10 Any other objection?

11 MR. HEENAN: Page 27 line 2,
12 through page 28 line 6.

13 THE COURT: What is the
14 objection?

15 MR. HEENAN: Foundation, Rule
16 602, undisclosed opinion testimony and relevance.

17 THE COURT: What's the relevance
18 of that?

19 MR. SIMPSON: He wants to get
20 into evidence that CACV had previously sued Mr.
21 McCullough through Bruce Spencer, and then wants
22 to pin my client with the fact that it didn't go
23 investigate why Mr. Spencer dismissed it.

24 Mr. Spencer was misled by Mr.
25 McCullough's answer into believing the statute of

1 limitations was up. And the relevance goes to
2 show that Mr. McCullough wasn't honest in his
3 answer that he originally filed in the Spencer
4 lawsuit, and he wasn't honest with respect to his
5 answer in this case or in the underlying
6 debt-collection action case. When he says he
7 hadn't made a payment in eight and a half years,
8 that's not true.

9 THE COURT: When did Dunker go to
10 work for CACV?

11 MR. HEENAN: It was subsequent to
12 2001. We asked him about that.

13 MR. BOHYER: I think he says in
14 there it's 2002.

15 THE COURT: The problem I have is
16 the question asks, did CACV make any mistakes in
17 its judgement and its pursuit of. You yourself
18 filed a motion to preclude any testimony about
19 that.

20 The defendant here isn't CACV.
21 So whether CACV made any mistakes, and especially
22 whether Mr. Dunker thinks they made any mistakes,
23 is irrelevant. And this all has to do with his
24 opinion on whether any mistakes were made. And
25 he wasn't involved in it, as I understand it. He

1 questions what somebody else did.

2 But I'm going to sustain that
3 objection because it is opinion testimony and I
4 think it is irrelevant.

5 Any other objections?

6 MR. HEENAN: Page 30 line 5,
7 through page 30 line 25.

8 MR. BOHYER: What was the end of
9 it, John?

10 MR. HEENAN: Line 25.

11 THE COURT: They designated 38
12 through 25.

13 MR. HEENAN: Oh, sorry, Your
14 Honor. 38 through 30/25.

15 THE COURT: While I'm getting
16 ready to look at that, I'll say if the plaintiff
17 takes the position and offers evidence that JRL
18 should have investigated, and the defendant wants
19 to present evidence about what they would have
20 learned if they investigated and somebody has
21 knowledge about that, I think they can testify
22 about that. But Mr. Dunker's opinion is what I'm
23 precluding.

24 MR. BOHYER: Fair enough.

25 MR. HEENAN: If I might, Your

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1 Honor, reference page 65, my examination of Mr.
2 Dunker:

3 Q. This deposition Exhibit 70, these
4 notes, did you input all this information
5 yourself?

6 A. No, I didn't.

7 Q. Other people inputted this information
8 as well?

9 A. That is correct.

10 Q. Like with respect to a payment made in
11 2001, you didn't input that information because
12 you didn't work at Collect America in 2001. Is
13 that true?

14 A. That is correct.

15 Q. Do you have any personal knowledge
16 other than these notes that a payment was made in
17 2001 by Mr. McCullough?

18 A. No.

19 THE COURT: But they don't ask
20 him that. They ask if it was a document that
21 CACV maintains in its ordinary course of
22 business. And he says that it is.

23 And there is no indication that
24 I've seen that he is not capable or qualified or
25 competent to testify that this is a document that

1 CACV maintains in its ordinary course of
2 business.

3 I will overrule the foundation
4 objection.

5 But your other objections are
6 what?

7 MR. HEENAN: Relevance and Rule
8 106. This Exhibit 70 was redacted by CACV's
9 counsel prior to providing it at this deposition.

10 THE COURT: What's the
11 defendant's response?

12 MR. SIMPSON: I think the
13 contents are relevant because they substantiate
14 that CACV did have information in its file that
15 there was a payment made by Mr. McCullough in
16 June of 2004. It was erroneous, but it was
17 documented in the notes.

18 We didn't do the redacting so I
19 can't speak to that. I don't know any more than
20 Mr. Heenan what was said in those portions. But
21 obviously --

22 THE COURT: It is what you've
23 got. I overrule the objection on redaction.

24 Then you had one other. What was
25 the other?

1 MR. HEENAN: Relevance. These
2 were notes maintained internally by CACV. There
3 was no evidence they were ever provided to
4 Johnson Rodenburg.

5 THE COURT: How are they
6 relevant?

7 MR. SIMPSON: Because some of the
8 information in the notes was conveyed to Johnson
9 Rodenburg.

10 THE COURT: So that is relevant.
11 But what CACV had, why is that relevant if it
12 wasn't conveyed?

13 MR. SIMPSON: I guess it depends
14 on the format that it was conveyed. They didn't
15 copy the notes in the file and say, this is a
16 photocopy of our notes, and ship them to Johnson
17 Rodenburg. But the particular point of
18 information that there is an entry under June 30,
19 2004 that says, Payment received from Mr.
20 McCullough, now that was the information that was
21 relayed in January of 2007 to Lisa Lauinger that
22 Mr. McCullough made this payment in June of 2004.
23 I think that's relevant to show not only did our
24 client believe it but there was documentation in
25 its client file also proving that point.

1 THE COURT: They didn't know
2 that. CACV is not the defendant here. What they
3 knew has no relevance. What they told JRL is
4 very relevant. That you're permitted certainly
5 to offer into evidence.

6 But what CACV knew or had in its
7 file that it didn't give to JRL, I don't see how
8 that could possibly be relevant.

9 So is Mr. Heenan correct that
10 this Exhibit 70, as an exhibit, was not something
11 that was given to JRL?

12 MR. SIMPSON: Information that
13 was contained -- I'm not trying to --

14 THE COURT: Right. I know there
15 might have been bits of information conveyed to
16 them in another form, but was this document given
17 to them?

18 MR. SIMPSON: It was not.

19 THE COURT: Okay. Then I sustain
20 that objection to the offered excerpt on page 30.

21 MR. HEENAN: Page 31 line 5,
22 through page 33 line 9, relevance, hearsay,
23 foundation.

24 If I might, what Johnson
25 Rodenburg is trying to establish is that it

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1 appears in these notes Mr. McCullough made a
2 payment in 2001, which would have put it within
3 the statute of limitations the first time they
4 sued him. It wouldn't put him in the statute of
5 limitations the second time. And also, CACV,
6 there is no evidence that CACV ever conveyed any
7 information about a 2001 payment to Johnson
8 Rodenburg.

9 MR. SIMPSON: Could I see the
10 transcript briefly, Your Honor?

11 THE COURT: Certainly.

12 MR. HEENAN: It's also hearsay,
13 Your Honor.

14 MR. SIMPSON: Was your objection
15 starting at 31/5?

16 THE COURT: Yes, 31/5 through
17 33/9, which was your entire excerpt for that
18 portion.

19 MR. SIMPSON: Part of this is
20 directly relevant, particularly at the end of
21 page 32, Your Honor, because while the plaintiff
22 wants to argue that my client didn't make a
23 reasonable investigation, when it comes down to
24 it, CACV doesn't -- you can testify right there
25 that my client doesn't have other sources. They

1 intend that in fact my client will rely on the
2 representations they make. I think that's
3 pointed out by Mr. --

4 THE COURT: But what CACV
5 intends, why does that have any relevance? This
6 is JRL's conduct and what JRL did.

7 And for the same reasons I think
8 I sustained some of your objections to his
9 excerpts, what CACV does isn't relevant here,
10 except insofar as they interacted with your
11 client. So run that by me again.

12 MR. SIMPSON: Well, on the one
13 hand the plaintiff wants to argue that pursuant
14 to the offer to place the account which contains
15 the clause that says CACV makes no warranty,
16 which I'm sure is going to be blown up larger
17 than life and put in front of the jury, at the
18 same time CACV and my client understand that CACV
19 is going to actually be the entity in most cases
20 that provides the information that my client is
21 entitled to rely on. And Mr. Dunker's testimony,
22 I think, helps establish that point.

23 Even though there is no expressed
24 warranty as to the information, CACV intends and
25 my client understands that's where the

1 information will come from.

2 THE COURT: I haven't read this.

3 But of course that's -- you don't dispute that,
4 do you? I mean, if JRL was going to get
5 information anywhere, they were going to get it
6 from CACV. Who else would they get it from?

7 MR. HEENAN: Here's my
8 understanding of the industry. Credit card
9 companies sell the accounts on a spreadsheet with
10 no information whatsoever that would be evidence
11 in a court of law. The debt buyers purchase
12 those accounts without that information.
13 Oftentimes they agree they would not ask for
14 information from the credit card company.

15 THE COURT: Can I stop you? I
16 find myself having a hard time listening to you
17 because I don't care what happens in the
18 industry. We are trying Mr. McCullough's case
19 against JRL. What happens in the industry
20 doesn't matter unless it happened here. Let's
21 focus on what happened here.

22 MR. HEENAN: The debt buyers
23 turned over those spreadsheets to Johnson
24 Rodenburg. The debt buyer has no more evidence
25 than Johnson Rodenburg does. Johnson Rodenburg

1 files suits without any evidence.

2 THE COURT: Okay. So 24 is 31
3 line 5. We have to go earlier for that to make
4 any sense.

5 Well, 31 line 5 is still talking
6 about Exhibit 70, right? Which we established
7 JRL has never seen.

8 MR. HEENAN: Correct, Your Honor.

9 THE COURT: So based on the
10 previous ruling, I'm going to exclude all the
11 offered excerpts on 31 because it relates to
12 Exhibit 70, which JRL never saw.

13 Is that true with all the rest of
14 it, then, that this all relates to that Exhibit?

15 MR. HEENAN: Yes, Your Honor.

16 THE COURT: Okay. I will give
17 you a chance, Mr. Simpson, to look at that and
18 confirm.

19 But for the same reason, then,
20 because there is no indication that JRL ever saw
21 Exhibit 70 and that testimony that is offered as
22 an excerpt is all about Exhibit 70, I'm going to
23 sustain the objection based on relevance.

24 MR. SIMPSON: Your Honor, would
25 you take a look, please, at page 32 line 23? And

1 I believe that goes beyond Exhibit 70.

2 THE COURT: Okay. So Mr. Heenan,
3 why is page 32 line 23, through page 33 line 9
4 not admissible?

5 MR. HEENAN: We withdraw our
6 objection.

7 THE COURT: It's moot, then,
8 because the objection is withdrawn and the
9 defendant may use page 32 line 23, through page
10 33 line 9.

11 MR. SIMPSON: So the record is
12 clear, Your Honor, we are not permitted to offer
13 or to present page 31 line 5, through page 32
14 line 22?

15 THE COURT: Correct. Any other
16 objections?

17 MR. HEENAN: Yes, Your Honor, we
18 would object to page 62 line 17, through page 63
19 line 9, as well as page 63 line 12, through page
20 64/21 for the same objections. These all concern
21 these internal CACV notes that were never
22 provided to Johnson Rodenburg.

23 THE COURT: Is that accurate, Mr.
24 Simpson?

25 MR. SIMPSON: 62/17, let me ask

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1 you a couple of follow-ups on Exhibit 70. Yes,
2 that's correct, through page 63 line 9, that's
3 about -- the answer is reflected in Exhibit 70.

4 THE COURT: I will sustain that
5 objection. 63/12 through 64/21?

6 MR. SIMPSON: With respect to
7 most of that, I would agree, although I ask the
8 Court to consider our question at page 64 line
9 16, through 64 line 21.

10 THE COURT: This is also about
11 that same document.

12 MR. SIMPSON: But I think the
13 record establishes that he is competent to
14 testify to the contents of the document at least
15 as a business record and what is reflected in the
16 document at the point --

17 THE COURT: Wait. He is able to
18 say what is a business record, but he follows
19 that up. The question is, does he know what it's
20 based on. He says, I know the person who put it
21 there, but I didn't have a conversation that
22 would indicate why she put it there.

23 So he doesn't have any personal
24 knowledge about that. So I'm going to sustain
25 that objection as well.

1 MR. BOHYER: For the record, the
2 page number again, please?

3 THE COURT: I sustain the
4 objection to 63 page 12 -- page 64 line 21.

5 Anything else?

6 MR. HEENAN: No, Your Honor.

7 THE COURT: Then we have Mr.
8 Dendy, Dr. McElhinney. I assume, given the
9 earlier ruling, that the plaintiff may call Dr.
10 McElhinney. I assume the defendant can ask
11 questions there and that the plaintiff would have
12 no objection so we don't have to bring him back
13 twice.

14 MR. HEENAN: Based on the Court's
15 ruling, Your Honor, I don't anticipate calling
16 Dr. McElhinney. I will just question him through
17 cross-examination in the defense's case.

18 THE COURT: Okay.

19 MR. HEENAN: As I understand it,
20 Johnson Rodenburg designated a limited portion of
21 Grace Lauinger's deposition and we raised an
22 objection to that as well.

23 THE COURT: That's on the may
24 call that I have. Do you intend to offer that?

25 MR. SIMPSON: Yes. I was

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1 double-checking here.

2 THE COURT: There's a hearsay
3 objection made. Does the defendant agree it's
4 hearsay?

5 MR. SIMPSON: No, I don't. And
6 we most likely would offer that.

7 THE COURT: I think I have Grace
8 Lauinger. Yes, I do.

9 I'm not sure how this is hearsay,
10 Mr. Heenan. What they are asking her to do is
11 look at a document and see if it refreshes her
12 memory, and she says it does.

13 MR. HEENAN: Then she reads into
14 the record what an e-mail to her from someone at
15 CACV says.

16 THE COURT: Because that part
17 refreshes her recollection and is part of the
18 business records of JRL, right?

19 MR. HEENAN: There's an e-mail
20 that is part of the file from --

21 THE COURT: That JRL maintains.

22 MR. HEENAN: Yes, but the e-mail
23 was from someone at CACV, so it's a statement by
24 a CACV employee that's being introduced through
25 someone at Johnson Rodenburg.

1 THE COURT: Is it an e-mail that
2 is maintained during the regular course of
3 business at JRL in handling these files?

4 MR. HEENAN: That I don't know.
5 I know it was provided in discovery as part of
6 the file.

7 MR. SIMPSON: Certainly. But not
8 only that, I don't believe it falls within the
9 definition of hearsay because the statements in
10 it aren't being offered in terms of the truth.

11 THE COURT: I will overrule the
12 objection.

13 MR. SIMPSON: Just for purposes
14 of order of proof, I guess I ask the Court's
15 permission to simply play that portion of Grace
16 Lauinger's testimony as effectively cross-exam
17 after Mr. Heenan plays the other portions.

18 THE COURT: Any objection? Why
19 don't you just include it? Then it will be done.

20 MR. HEENAN: Sure.

21 MR. SIMPSON: That would be
22 great. Thank you.

23 THE COURT: Anything else on
24 witnesses?

25 MR. BOHYER: Hopefully not.

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1 THE COURT: Let's turn to
2 exhibits, then.

3 I'm going to meet with a
4 probation officer. We will have to take a short
5 break.

6 (Brief recess.)

7 THE COURT: I think we concluded
8 with the witnesses. What I would like to do,
9 unless someone has an issue to raise, is to turn
10 to the exhibits. And we will turn first to
11 plaintiff's will offer exhibits.

12 There is no objection made to
13 Plaintiff's Exhibits 1, 2, 3, or 4. So Exhibits
14 1, 2, 3 and 4 are admitted.

15 There's an objection on relevance
16 to Exhibit 6, the Collection Master sample
17 screen.

18 What is the relevance of this,
19 Mr. Heenan?

20 First, let me hear the objection.

21 MR. SIMPSON: It doesn't have
22 anything directly to do with this case.

23 THE COURT: Mr. Heenan, what is
24 the relevance?

25 MR. HEENAN: Collection Master,

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1 the software system that Johnson Rodenburg
2 employs in the collection of debts and the use of
3 the legal system in its collection efforts,
4 Exhibit 6 is illustrative of what the software is
5 and will just help the jury understand what the
6 software is and what it does.

7 THE COURT: Where did this come
8 from?

9 MR. HEENAN: Collection Master's
10 web site.

11 THE COURT: Don't we have
12 something from the law firm that shows the same
13 thing?

14 MR. SIMPSON: If there is one
15 from our client with respect to Mr. McCullough, I
16 will not object to that.

17 THE COURT: I thought there was
18 something like this.

19 MR. HEENAN: Exhibit 111 -- we
20 withdraw that. Exhibit 111 is the actual
21 collection screen for Mr. McCullough.

22 THE COURT: So Exhibit 6 is
23 withdrawn, therefore refused.

24 Exhibits 7, 10, 13, 14 and 30 are
25 admitted without objection.

1 Exhibit 51, and let's just do 51,
2 52 and 53. Because they are the same objections
3 made by the defendant to each of these exhibits.

4 It appeared to me, Mr. Heenan,
5 these are things taken off the Internet. Number
6 one, I don't know how you're going to lay a
7 foundation for them, and, number two, what
8 relevance do they have to the lawsuit?

9 MR. HEENAN: With respect to
10 relevance, Your Honor, they all concern Johnson
11 Rodenburg's filing of lawsuits without any actual
12 evidence admissible in a court of law that the
13 people they sue owe the debts.

14 THE COURT: I know they have to
15 do with somebody doing that, but they don't have
16 to do with JRL doing that, right?

17 MR. HEENAN: JRL follows a
18 pattern in this collection industry of here's how
19 you're able to, without any evidence, win a
20 lawsuit and get a judgement. And the pattern is
21 propound requests for admission and hope the
22 other side doesn't respond, gather affidavits
23 from your client, even though they may lack
24 personal knowledge as to the things claimed in
25 their affidavits --

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1 THE COURT: Let me stop you.

2 What is the foundation for this?

3 MR. HEENAN: With respect to
4 Exhibit 51, Johnson Rodenburg is a member of this
5 NARCA, National Association of Retail Collection
6 Attorneys. So presumably, through
7 cross-examination, I can establish they are a
8 member of that organization. They read this
9 newsletter, they consider --

10 THE COURT: Did they admit they
11 had seen this newsletter in their deposition?
12 Did you ask them?

13 MR. HEENAN: I don't think I had
14 this newsletter when I took their depositions.

15 THE COURT: So right now there is
16 no foundation for it.

17 MR. HEENAN: Correct, Your Honor.

18 THE COURT: Is the same thing
19 true with 52 and 53?

20 MR. HEENAN: 51, 52 and 53 were
21 also reviewed by Mr. Patten, and I think there's
22 going to be foundation that's how he forms the
23 basis of his opinions with respect to this
24 industry as a whole.

25 THE COURT: That doesn't mean

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1 these things come into evidence just because he
2 looked at them.

3 MR. HEENAN: That's true.

4 THE COURT: I am going to sustain
5 the objections to 51, 52 and 53 on foundation.
6 If you can somehow lay a foundation, we will
7 address the other. But I will sustain the
8 objections at this time to 51, 52 and 53.

9 67 and 71 are admitted.

10 100, a time sheet for McCullough
11 defense. This is Mr. Heenan's time sheet. There
12 is a relevance objection. I assume that's
13 because the jury doesn't decide attorneys' fees.

14 Mr. Heenan, I may consider this
15 if, after this is all over, there is an issue
16 with respect to awarding attorneys' fees, but
17 what would be the purpose of showing this to the
18 jury?

19 MR. HEENAN: One of the elements
20 of damages in a malicious prosecution act is your
21 attorneys' fees for defending a malicious
22 lawsuit. So these fees would be outside of what
23 is claimed as part of the prosecution of this
24 current lawsuit.

25 THE COURT: This doesn't say

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1 anything about fees.

2 MR. HEENAN: We withdraw Exhibit
3 100, Your Honor.

4 THE COURT: Exhibit 100 is
5 refused as withdrawn.

6 Exhibits 101 and 102 are
7 admitted.

8 Exhibit 103, agreement for
9 collection of accounts. There is, again, a
10 relevance objection.

11 What is the objection to this
12 exhibit, Mr. Simpson?

13 MR. SIMPSON: It doesn't make any
14 fact at issue more or less probable. It's simply
15 the general agreement, if you will, under which
16 my client agreed to provide professional services
17 to Collect America and CACV.

18 THE COURT: Mr. Heenan?

19 MR. HEENAN: Page two Exhibit
20 103-2, Local counsel agrees that it will fully
21 represent the interests of the client in the
22 pursuit of the referred claims. Such
23 representation shall include the verification of
24 account information sent by CALTB to local
25 counsel.

1 We think it has relevance, the
2 same as the other contract with CACV, because it
3 imposes on Johnson Rodenburg an independent duty.

4 THE COURT: And it was pursuant
5 to this agreement that the McCullough lawsuit was
6 filed.

7 MR. SIMPSON: Well, there was
8 this agreement and there was the offer to place
9 account, which was more specific to Mr.
10 McCullough's case, and that's already been
11 offered and admitted as Plaintiff's 67.

12 THE COURT: But this agreement
13 did apply to the work that the law firm did for
14 CACV.

15 MR. SIMPSON: I believe that's
16 true.

17 THE COURT: Then I will overrule
18 the objection and 103 is admitted.

19 MR. BOHYER: Would you entertain
20 a cumulative objection, Your Honor, given there
21 was a specific one that deals with McCullough?

22 THE COURT: I will entertain it
23 and overrule it.

24 MR. BOHYER: Thank you.

25 THE COURT: 104 is admitted

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1 without objection -- no, no. I misspoke. There
2 is an objection. 104, subpoena to Chase Bank
3 dated 8/26/08.

4 Now, this isn't a subpoena that
5 your client sent in the underlying case. How
6 could this not be relevant?

7 MR. SIMPSON: This is a subpoena
8 that I sent to this case.

9 THE COURT. I thought this was a
10 subpoena that your client sent. I'm sorry.
11 That's '08, not '07.

12 What does this have to do with
13 this thing, Mr. Heenan?

14 MR. HEENAN: I think it shows had
15 Johnson Rodenburg requested this information
16 prior to suing Mr. McCullough, it would have come
17 to learn that the credit card company had no
18 information about him or his account.

19 THE COURT: I'm going to sustain
20 the objection. You can offer that in some way
21 but I don't think the subpoena that defense
22 counsel sent is relevant. I'm not trying Mr.
23 Simpson here.

24 MR. HEENAN: Understood.
25 Probably same roughly with Exhibit 105.

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1 THE COURT: Yes. 105 is refused.

2 Then we go to 106, which is a
3 response by the defendant to discovery request of
4 the plaintiff. And it is the list of legal
5 actions filed by JRL between January of '07 and
6 June of '08.

7 What is the objection?

8 MR. SIMPSON: Relevance and it's
9 more prejudicial than probative, and it's likely
10 to confuse and mislead the jury.

11 THE COURT: How would it confuse
12 them?

13 MR. SIMPSON: I think they would
14 be confused wondering why they are looking at
15 cases filed by Unifund, First Resolution
16 Investment, City Bank, National Credit Adjustors,
17 Credit Bank, Sears Roebuck against people who
18 have nothing to do with this case.

19 THE COURT: These are all cases
20 filed by the defendant. Correct?

21 MR. SIMPSON: That's true.

22 THE COURT: I'm going to overrule
23 the objection.

24 MR. BOHYER: Even as to those
25 cases that were filed after the underlying

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1 lawsuit was dismissed in the fall of '07?

2 THE COURT: I think the time is
3 an issue.

4 Tell me, Mr. Heenan, why action
5 taken, for example, in June of '08, which I think
6 is around the time this lawsuit was filed -- when
7 was this lawsuit filed? I don't remember.

8 MR. SIMPSON: The underlying suit
9 was dismissed in December of 2007 and I believe
10 Mr. Heenan filed this lawsuit in either December
11 of 2007 or January of 2008.

12 THE COURT CLERK: It's an '07
13 case so it's '07.

14 THE COURT: Yes, thank you.

15 Mr. Heenan, the law that we were
16 discussing at the hearing on the motion in limine
17 talks about the relevance of past conduct of the
18 defendant. Why is anything that the defendant
19 did in June of 2008 relevant to the jury's
20 consideration here with respect to what they did
21 to Mr. McCullough?

22 MR. HEENAN: I don't know that
23 their business practice has changed at all, but
24 if it has, then arguably it wouldn't be relevant.
25 The whole point in our minds is this business

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1 model of filing all these lawsuits without
2 information.

3 In discovery, I tried to narrowly
4 tailor the time frame of the discovery to cure
5 any type of overbroad or unduly burdensome
6 objections, so I asked for 2007 to present.
7 Johnson Rodenburg resisted it and then ultimately
8 produced the information in June. So this is the
9 document that I was provided in response to the
10 discovery.

11 THE COURT: What I'm going to do
12 is sustain the objection as to timeliness and
13 allow it from January of 2007 until the date the
14 lawsuit was dismissed. However, Mr. Heenan may
15 ask whether their practices have changed, and
16 that could open the door.

17 MR. BOHYER: Well, the problem,
18 Your Honor, is they will be led down the primrose
19 path. That's not opening the door.

20 THE COURT: We will deal with
21 that when we come to it. But right now, I will
22 sustain the objection to that portion of Exhibit
23 106.

24 What day was it dismissed?

25 MR. SIMPSON: Around the 10th or

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1 11th of December.

2 As a practical matter, Your
3 Honor, it may be difficult by looking at Exhibit
4 106 to split this up and present it in such a way
5 that the jury's not left wondering why half the
6 lines are blacked out.

7 THE COURT: Do you want to
8 withdraw your objection to timeliness, then?

9 MR. SIMPSON: No.

10 MR. HEENAN: I think technically,
11 Your Honor, I can also just introduce the same
12 thing as the defendant's response to
13 Interrogatory Number 10. It's been designated in
14 the pretrial order as one of the discovery
15 responses that we intend to rely on.

16 THE COURT: It still has to be
17 admissible. The fact it was produced in
18 discovery doesn't alone make it admissible.

19 MR. HEENAN: Sure.

20 THE COURT: Because it includes
21 actions they took after they finished dealing
22 with Mr. McCullough. Do you know -- I guess you
23 can tell because of the case numbers, at least
24 those that are in '08, but you would have to go
25 through and delete the '08s, which would leave

1 gaps.

2 MR. HEENAN: I would be happy to
3 do that, Your Honor.

4 THE COURT: Do that and we will
5 just say everything from '08 forward. So I will
6 sustain the objection and limit it to legal
7 actions in the year 2007.

8 107, Clifton Rodenburg.
9 Objection 402, 403.

10 Mr. Heenan, I looked at this and
11 I don't recall ever hearing anything about
12 Clifton Rodenburg before, and it says that he is
13 an attorney and partner in the law firm of
14 Gackle, Johnson, Rodenburg and Trator (ph). What
15 does this have to do with this lawsuit?

16 MR. HEENAN: It's my
17 understanding that Gackle, Johnson, Rodenburg and
18 Trator was the predecessor to Johnson, Rodenburg
19 & Lauinger. It's my understanding Mr. Rodenburg
20 isn't going to be attending the trial so I would
21 like the jury to be able to see what Mr.
22 Rodenburg looks like. It has his picture on the
23 first page there.

24 But it also shows, at least with
25 respect to Mr. Rodenburg, how his collection

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1 model is designed. And I think it's relevant to
2 show that's the collection model that is in
3 business and up and running and was up and
4 running with respect to Mr. McCullough and how
5 they prosecuted the claim against him.

6 MR. SIMPSON: Your Honor, in the
7 first instance, Mr. Rodenburg's conduct isn't
8 part of this lawsuit. I would also note --

9 THE COURT: Is it the same one?

10 MR. SIMPSON: It is the same
11 Rodenburg, yes.

12 THE COURT: They are the
13 defendant.

14 MR. SIMPSON: The firm, yes. But
15 this is too remote in time, I believe. Hopefully
16 I can say this without waiving attorney-client
17 privilege, but I believe it was published in the
18 mid eighties. This is quite remote in time to
19 the conduct alleged to have occurred in this case
20 and I don't believe there was any testimony in
21 any of the Johnson Rodenburg depositions as to,
22 do you follow this advertising material, if you
23 will, in your service for debt-collection
24 clients.

25 THE COURT: What is your

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1 foundation, Mr. Heenan?

2 MR. HEENAN: I would have to
3 establish that through one of the Johnson
4 Rodenburg attorneys and whether they use
5 advertising as part of their collection practice
6 and whether, specifically, this advertising.

7 THE COURT: I will reserve on
8 this.

9 I want to go back to 106. I'm
10 going to reserve on 106 as well, but I ask you to
11 prepare an alternative exhibit as we discussed.
12 I want to look at that a little bit more, Mr.
13 Heenan.

14 MR. HEENAN: Yes, Your Honor.

15 THE COURT: 108. This is --

16 MR. HEENAN: Your Honor has ruled
17 on that through the motion in limine.

18 THE COURT: Yes. So I'm going to
19 refuse this for the same reasons articulated in
20 ruling on the motion in limine.

21 109. This involves Ms. Henan's
22 lawsuit, as does 110, Mr. Lucero's. And I
23 indicated, when we had the hearing on the motion
24 in limine, that I would allow them to testify.

25 But why does the jury in this

1 case need to see documents from these other
2 cases? Why can't we just hear from the
3 plaintiffs what happened? I'm concerned this is
4 going to be confusing.

5 MR. HEENAN: You're right. We
6 withdraw these as exhibits. I may need to
7 provide them to the witnesses to refresh their
8 recollection as to the lawsuit.

9 THE COURT: Okay. So then 109
10 and 110 are withdrawn.

11 That leaves 111, which we
12 discussed before there is no objection. 111 is
13 admitted.

14 That concludes the plaintiff's
15 will offer. I'll reserve on a plaintiff's may
16 offer.

17 Do you know whether you intend to
18 offer these at this time?

19 MR. HEENAN: 112, Your Honor,
20 would only be offered if and when the jury
21 concluded that punitive damages were appropriate.
22 So it would only be as part of that second phase.

23 113 I do intend to at least
24 cross-examine on and potentially admit as an
25 exhibit at trial.

1 THE COURT: I will reserve on
2 both of those.

3 Let me ask with respect to the
4 tax return. The net worth of a defendant is
5 certainly relevant if the jury decides to award
6 punitives, but is the net income?

7 MR. HEENAN: I would ask to be
8 able to answer that question if and when
9 appropriate.

10 THE COURT: Okay. Fair enough.

11 Okay. I think that concludes all
12 of the plaintiff's exhibits. Let's turn to the
13 defendant's.

14 The first is Number 70.
15 McCullough's account information report with
16 CACV.

17 Is this the document that we
18 discussed earlier with respect to Mr. Dunker that
19 he had no knowledge of?

20 MR. HEENAN: Yes, Your Honor.

21 THE COURT: I don't know that he
22 had no knowledge, but never had conveyed to JRL.

23 MR. BOHYER: He tried to have
24 knowledge.

25 THE COURT: During part of the

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1 deposition, he had knowledge. So for the same
2 reasons that we previously discussed, I will
3 sustain the objections to 70, and it is refused.

4 501 is admitted without
5 objection.

6 502, let's talk about 502 through
7 504, which is correspondence. They are
8 foundation objections. And I will reserve on
9 these.

10 502 through 504 -- excuse me.
11 501, there is no objection. That was admitted.
12 So 502, 503 and 504.

13 MR. HEENAN: Your Honor --

14 THE COURT: Oh, you didn't object
15 to 504. Thank you. 504 is admitted.

16 MR. BOHYER: Your Honor, may I
17 inquire as to what the reservation as to
18 foundation is on 502 or 503?

19 THE COURT: Because I don't know
20 what foundation will be laid, but I assume one
21 can be.

22 MR. BOHYER: Lisa Lauinger will
23 testify.

24 THE COURT: As soon as one is, I
25 assume it will come in. This is part of the

1 business transaction.

2 MR. HEENAN: I withdraw the
3 objections, Your Honor, in light of the Court's
4 ruling.

5 THE COURT: Okay, then, 502 and
6 503 are admitted without objection.

7 That brings us to 505, the bill
8 of sale. Now, is this another document that was
9 never conveyed to JRL?

10 MR. SIMPSON: This was. These
11 are some of the exhibits we talked about when we
12 were discussing Bobby Dunker's deposition, 505
13 and 506.

14 THE COURT: Oh, these are the
15 ones they prepared.

16 MR. SIMPSON: I can certainly
17 tell you that 506 was in the file. And I believe
18 505 was. My only hesitation there is it doesn't
19 have our Bates number of JRL at the bottom.

20 THE COURT: I would reserve on
21 these two.

22 MR. BOHYER: 505 and 506?

23 THE COURT: Yes.

24 That brings us to 507,
25 plaintiff's credit statements and important

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1 notice about credit card account.

2 What is the objection to this?

3 You have several. Can you explain them to me?

4 MR. HEENAN: Yes, Your Honor.

5 These are documents that were purportedly --
6 while the credit card contract no one testified
7 where it came from, that it has anything to do
8 with Mr. McCullough, Mr. Dunker testified that he
9 had no personal knowledge about what that
10 document was or whether it had anything to do
11 with Mr. McCullough. Same with these credit
12 statements. So there's a lack of personal
13 knowledge. There is no foundation. They are
14 hearsay. I don't know who prepared these
15 documents. They are not authenticated.

16 MR. SIMPSON: Your Honor, I think
17 I can simplify it. 507 is somewhat redundant of
18 what is contained in Exhibit 508. I believe the
19 only real difference is that 508 actually
20 contains a cover letter from Grace Lauinger at
21 Johnson Rodenburg to Mr. McCullough, which
22 included a copy of those documents.

23 And so we can withdraw 507, but
24 we would assert that 508 was relevant because
25 this was information provided to our client by

1 CACV, having to do with Mr. McCullough's credit
2 card account. And it shows certainly what the
3 information was that was provided to my client,
4 what they had in their file. And this in fact
5 was sent along to Mr. McCullough as verification
6 of the debt.

7 THE COURT: So 507 is refused
8 because it was withdrawn.

9 And 508, do you have a question
10 about whether this was in fact a letter that
11 Grace Lauinger sent to your client?

12 MR. HEENAN: It's not the letter,
13 Your Honor. It's just it's a backhand way to get
14 the same information and without a foundation of
15 what those account statements were. They
16 prepared them, they purport to concern Mr.
17 McCullough, but there is no foundation from
18 anyone that can say that they either got them
19 from Chase Manhattan, certainly no one that can
20 say they prepared them at Chase Manhattan.

21 What makes it concerning is when
22 subpoenas get served to Chase Manhattan, they
23 say, We don't have any information about this
24 account. I have no way to test the veracity of
25 the account statements, and I'm concerned the

1 jury will think these are the statements that
2 apply to Mr. McCullough and I don't have any
3 ability to test that. And based on the responses
4 to two subpoenas, I have strong doubts that those
5 documents were prepared by Chase Manhattan or had
6 anything to do with Mr. McCullough.

7 THE COURT: Let's deal with
8 foundation first. Grace Lauinger. Let me see.

9 Does Mr. McCullough recall
10 getting this? Is he going to testify this is a
11 true and correct copy of --

12 MR. HEENAN: He is not going to
13 object to the letter or that he got some stuff,
14 some documents, attached with the letter. The
15 concern I have is that the documents that are
16 attached with the letter, there is no way to test
17 where those documents -- Grace Lauinger says she
18 doesn't know where they came from. All she can
19 say is CACV.

20 Mr. Dunker, who is the one
21 witness at CACV who was deposed, says he doesn't
22 know where the documents come from. He asked
23 someone else at CACV but he couldn't tell me who
24 the person was.

25 Unless someone can come in and

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1 say, These are the documents I got from Chase
2 Manhattan, then I have foundation concerns,
3 especially in light of the responses to the
4 subpoenas.

5 THE COURT: What's the
6 defendant's position?

7 MR. SIMPSON: Well, these are
8 records that were provided to my client. They
9 will testify these were records they received
10 from CACV relevant to Mr. McCullough's credit
11 card account, and this is the kind of thing they
12 would ordinarily receive in a case like this.

13 To an extent, Mr. McCullough can
14 use this to his advantage because it shows the
15 date of the last payment being in August of 2000,
16 not in 2004.

17 But I certainly think that my
18 client is entitled to show, look, it wasn't like
19 we didn't have anything on Mr. McCullough at any
20 time during the course of this case. We have a
21 credit card statement. Here it is.

22 MR. HEENAN: These documents,
23 it's my understanding, Johnson Rodenburg didn't
24 have when they sued Mr. McCullough but obtained
25 them sometime after they actually filed the

1 lawsuit.

2 THE COURT: Well, and then Grace
3 Lauinger writes Mr. McCullough and says, here's
4 verification of this matter. But this is the
5 2002 credit card statement. So it couldn't have
6 had anything to do with him.

7 MR. HEENAN: No.

8 THE COURT: And you don't want
9 these admitted?

10 MR. HEENAN: I just think -- I
11 don't, Your Honor, because I think it confuses
12 the jury because it makes it appear that this is
13 a procedural argument that we are raising when
14 it's not. It's an instance of suing people with
15 no documents and not being able to get any
16 documents.

17 THE COURT: So your objection to
18 foundation I will reserve on. But it appears,
19 through your client and JRL, there likely will be
20 a foundation.

21 With respect to your hearsay and
22 other objections, I will reserve on that. We
23 will see how the evidence comes in.

24 MR. SIMPSON: May I offer one
25 other point on that, with respect to hearsay?

1 THE COURT: Sure.

2 MR. SIMPSON: We are not offering
3 them to show they are true but to show my
4 client's state of mind to rebut the allegation of
5 malice.

6 THE COURT: 509 is admitted
7 without objection, as are 510, 511, 512 and 513.

8 514, there is a relevance
9 objection. You know, I understand we are going
10 to have some experts testify as to the
11 conclusions they reached after examining the
12 plaintiff. Typically the tests that they
13 administer, the underlying tests, are not
14 admissible, although their opinions based on them
15 are.

16 What is the purpose of this and
17 how is that relevant?

18 MR. SIMPSON: I think some of
19 these things will go to how the jury should
20 assess Mr. McCullough's credibility as a witness.
21 And these are statements certainly that he made
22 during the course of this litigation with respect
23 to his opinions or feelings on a number of
24 different issues, and I think the jury is
25 entitled to hear what he said with respect to

1 these various questions, whether he agreed with
2 them or not. I think these are directly
3 relevant. I mean, if he is making a claim that
4 he was emotionally distressed, here is some
5 direct proof.

6 MR. HEENAN: I think Johnson
7 Rodenburg certainly is allowed to ask questions
8 of Mr. McCullough with respect to his personality
9 assessment and inventory, but we object to it
10 being offered as an exhibit and given to the jury
11 when they deliberate.

12 MR. BOHYER: It's an admission of
13 a party, Your Honor.

14 THE COURT: I'm not sure it is.
15 I will reserve on that. You can certainly
16 cross-examine him about it. I'm concerned about
17 allowing a personality assessment tool used by an
18 expert be submitted to the jury.

19 MR. BOHYER: Let me make sure I
20 understand. You're reserving on the admission of
21 the exhibit, but let me be clear. We are
22 entitled to ask Mr. McCullough whether or not he
23 answered the specific questions one way or the
24 other?

25 THE COURT: You can cross-examine

1 him on it.

2 MR. BOHYER: Thank you.

3 THE COURT: That concludes the
4 will offer. I will reserve on all the may
5 offers, unless there is any item there on that
6 anybody wishes to raise at this time.

7 MR. SIMPSON: I think with
8 respect to the foundation objections, plaintiff's
9 medical records including Exhibits 515, 516, 517,
10 518, 519, I believe those all came from or were
11 produced in this case by Mr. McCullough in
12 response to discovery. I don't recall that he
13 made objection to foundation at the time. So if
14 he did, I apologize, but I don't think he did.
15 And if he didn't, I think they are waived under
16 the local rules.

17 THE COURT: Is there any
18 question, really, about the foundation that these
19 are in fact true and correct copies of the
20 plaintiff's medical records?

21 MR. HEENAN: No.

22 THE COURT: Are you withdrawing
23 your foundation objection to 515 through 519?

24 MR. HEENAN: Yes, Your Honor.

25 THE COURT: What is your

1 objection?

2 MR. HEENAN: It's hearsay. I
3 think experts can be examined about the
4 plaintiff's medical records. He can be examined
5 about his medical records, but designating as an
6 exhibit and sending to the jury my client's
7 medical records that he didn't produce, were
8 produced by doctors under his treatment --

9 THE COURT: Let's talk about
10 that. In personal injury actions, medical
11 records are introduced all the time. What I was
12 saying about the personality profile, as I
13 understand it, there were some IMEs or some
14 examinations done by psychologists in preparation
15 for this lawsuit, and they administered some
16 tests. But they weren't medical records of
17 ongoing care of the plaintiff during the time
18 frame that is at issue here. I think that's
19 quite different, isn't it?

20 MR. HEENAN: Well, in a personal
21 injury case, I can't, without my client's
22 treating physician, just hand the jury a bunch of
23 my doctor's medical records and say, see, this
24 proves causation.

25 Same here. I don't think you can

1 just mark a bunch of medical records and say,
2 see, this proves that on this day Mr. McCullough
3 had this problem or didn't have this problem.

4 There needs to be -- the treating
5 physician himself has to lay the foundation or
6 talk about what the records say. Otherwise, it's
7 hearsay.

8 THE COURT: I'm going to reserve
9 on those. They are on the may offer list in any
10 event. So we will see.

11 MR. HEENAN: If we could, Your
12 Honor, address 524, the settlement agreement.
13 Just because we didn't make a motion in limine.
14 I understand Your Honor's rulings. We provided
15 Johnson Rodenburg's counsel with the settlement
16 agreement, but I'm fearful that if we wait until
17 those questions come up there would already at
18 that point be prejudice.

19 So I move in limine or ask Your
20 Honor to consider in limine whether Johnson
21 Rodenburg can examine or raise the issue of the
22 settlement agreement with CACV. We briefed it in
23 the context of whether it's discoverable.

24 THE COURT: I think that's
25 already been addressed in the order. Because

1 when I ordered that it be produced, I also issued
2 basically a protective order that only defendant
3 and its attorneys could look at it and they
4 couldn't disseminate it anywhere else and
5 couldn't use it without prior leave of Court.

6 I think in essence there is
7 already a limine order. That was my intent. Do
8 you understand it that way?

9 MR. SIMPSON: Yes, Your Honor.

10 MR. HEENAN: Thank you.

11 MR. SIMPSON: I think the issue
12 Mr. Heenan raised is a good one. We would like
13 clarification as to whether we are entitled or
14 allowed at this point to cross-examine Mr.
15 McCullough about the fact that if -- well, I
16 guess this ties in with the other issue I raised
17 with the hearing this morning about whether Mr.
18 Heenan and Mr. McCullough are going to be allowed
19 to ask for set dollar amounts in damages.

20 I guess here is my example. If
21 Mr. McCullough says, or Mr. Heenan says, in
22 closing, I think Mr. McCullough should be awarded
23 a million dollars in compensatory damages, I
24 think, number one, I think that's an unfair
25 surprise because I haven't been provided in

1 discovery any number as to what various
2 categories of damages were being sought. It was,
3 you know, left to the sound discretion of the
4 jury, or words to that effect.

5 But if that is allowed, if the
6 plaintiff is allowed to go ahead with that, I
7 think it's fair game for me to say to Mr.
8 McCullough, you also sued CACV of Colorado,
9 didn't you? And you made the same claims against
10 them and you settled that claim for a total of
11 \$10,000.

12 THE COURT: No, you can't do
13 that. I'm not going to allow you to do that. If
14 they somehow open the door, you can, during a
15 recess, let me know and we will discuss it again.
16 But I think it's an offset.

17 I decided, because of the prior
18 rulings, that you were entitled to know what that
19 was and what the offset would be. But that is a
20 settlement agreement. And I don't believe that
21 you are entitled to cross-examine in the way you
22 just articulated.

23 MR. BOHYER: The other issue I
24 think is much more fundamental, Your Honor,
25 because with discovery propounded asking for what

1 the damages are that are being sought against our
2 client, without those numbers being provided, a
3 defendant is prejudiced unfairly by not being
4 able to discuss settlement options with their
5 client in advance. We have gone through that.
6 Actually, Fred went through it with Judge Molloy
7 here fairly recently on another case, on this
8 specific issue where the discovery is propounded.

9 THE COURT: Was the discovery
10 asked?

11 MR. HEENAN: If I might, Your
12 Honor, first of all, and correct me if I'm wrong,
13 but Mr. McCullough was asked in his deposition,
14 how much money do you want? And his answer was,
15 whatever a jury awards. I have no specific. I
16 want justice, was basically his answer.

17 And so I don't anticipate that
18 his answer is going to change at trial, because
19 that's what he wants. In discovery, questions
20 were raised about what are your damages. We
21 articulated all the categories of damages,
22 attorneys' fees, everything else. We gave
23 specific dollar values to the economic damages.
24 With respect to noneconomic damages like punitive
25 damages, we said that's for the jury to decide

1 after hearing all the evidence.

2 So I don't think I can introduce
3 any testimony from someone that says, this kind
4 of case, you know -- for example, if Mr. Patten
5 said, this is a million dollar case, I think
6 that's improper. But I don't think there is
7 anything that precludes me in closing argument
8 from advocating for a dollar amount that is going
9 to do the justice that Mr. McCullough has
10 requested from the beginning.

11 THE COURT: That's my
12 understanding.

13 Are you saying Judge Molloy ruled
14 something different?

15 MR. BOHYER: Yes, and we also got
16 an award from Judge Stadler on a state court case
17 on the same thing. Here's what occurs, Judge.
18 If the defendant does not know what they're being
19 sued for, we went through a settlement conference
20 on this thing. Settlement demands are made, if
21 you will. But until we know how much our client
22 is being -- how much is going to be claimed in
23 front of the jury on this via the discovery
24 process, that's our only means to know. Both
25 Judge Molloy -- what was the name of the case?

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1 It was --

2 MR. SIMPSON: There was no
3 written order. Sorry to jump around. It wasn't
4 a written order. It was at the final pretrial
5 conference in a case called *Reiner v. Hammonton*
6 *Inn v. Northwest Painting*.

7 And I raised the issue in the
8 pretrial order that the plaintiff had not
9 provided any numerical figures for the various
10 categories of damage that she was seeking in that
11 case. And my understanding from Judge Molloy's
12 oral ruling at the pretrial conference was the
13 plaintiff was free to argue to the jury she
14 should be awarded damages for the various
15 elements but that they couldn't, then, come into
16 trial and ask for, for instance, a million
17 dollars for pain and suffering or emotional
18 distress or other elements where those numbers
19 hadn't been provided in discovery.

20 I received a written ruling out
21 of a state court in Kalispell on an issue where
22 we had moved to compel answers providing numbers
23 for the various items of general damage that the
24 plaintiff was seeking. The Court, Judge Stadler,
25 ruled in that case that he wouldn't grant the

1 motion to compel, but if the plaintiff wasn't
2 going to provide figures in discovery, the
3 plaintiff would be precluded from asking for any
4 specific figure at trial.

5 MR. BOHYER: The discovery
6 requests are designed to illicit information upon
7 which we can advise our client. Based upon what
8 is now disclosed in the final pretrial order, our
9 client is looking at potentially an excess claim,
10 which it was not before.

11 While it is true that the award
12 of the emotional distress or other general
13 damages is subject to the jury's sound
14 discretion, that is a different question or a
15 different issue than us asking the plaintiff to
16 please advise us how much you've been damaged in
17 this regard and what do you intend to seek.

18 MR. HEENAN: If I might, Your
19 Honor, the written discovery propounded to Mr.
20 McCullough, he answers those questions. He
21 answered the questions the same as he answered in
22 his deposition: I don't know. I want justice.
23 It's for whatever the jury thinks my claim is
24 worth after hearing all the evidence.

25 That doesn't preclude me, as his

1 advocate, from, in closing argument, suggesting
2 to the jury what they might consider to be
3 justice or what might remedy some of the
4 wrongdoing that is on display in this case.

5 THE COURT: But if it's simply an
6 answer in a deposition, I think that is somewhat
7 different than if you're asking in an
8 interrogatory, Please state your claim for these
9 categories of damage that you're seeking. And
10 then, certainly, counsel is assisting his client
11 in talking about what the claim is and in saying,
12 this is what we are seeking.

13 So because counsel certainly is
14 involved at that point, doesn't the party have an
15 obligation, then, if they have sufficient
16 information, to state, this is what we are
17 seeking. And why isn't it a legitimate argument
18 that it's then a surprise if not knowing that you
19 were seeking a million dollars at the time of the
20 final pretrial order, all of a sudden, wow, we
21 are looking at an excess claim here?

22 MR. HEENAN: That
23 mischaracterizes the settlement posture of this
24 case. And Johnson Rodenburg was put on notice
25 early on, prior to the mediation, that they had

1 an opportunity to resolve it within limits --

2 THE COURT: We are not talking
3 about settlement. We are talking about the
4 discovery requests.

5 Did the defendant make a
6 discovery request to the plaintiff here that
7 said, Please state the amount of damages you're
8 claiming for each category of damage you seek.

9 MR. HEENAN: I don't know without
10 having it in front of me.

11 MR. SIMPSON: I would represent
12 to the Court we did, Your Honor. I looked
13 through the responses and supplemental responses.
14 And if there was a response that said a number, I
15 missed it. It's my understanding and my belief
16 that the categories of damages were specified.
17 It's possible that it said we want a thousand
18 dollars for statutory damages, but frankly that's
19 not the gist of it.

20 The concern I have is that, where
21 it says relief sought now in the pretrial order,
22 that Mr. McCullough wants a million dollars for
23 emotional distress damages and a million dollars
24 for punitive damages. My recollection is that
25 those figures were never provided to us in

1 discovery. No figures were provided.

2 MR. HEENAN: Even the million
3 dollars --

4 THE COURT: Okay. I don't have
5 enough information to say anything other than
6 what I already said. If you want me to preclude
7 them, I need to see the discovery requests and
8 all the responses.

9 MR. BOHYER: We will provide
10 them.

11 THE COURT: That would be
12 helpful. Then we can talk about it again at the
13 morning of trial.

14 MR. BOHYER: I don't know if we
15 can get a copy of the record from that final
16 pretrial from Judge Molloy and the Reiner case,
17 but if we can, we will do it.

18 THE COURT: Okay. I had
19 indicated earlier that I would give you the
20 preliminary instructions. I'm going to wait
21 until the morning of trial now because they are
22 going to change because of what we talked about
23 with instructing on the agreed facts and what I
24 will read to the jury. But they will be all
25 stock instructions, just burden of proof. These

1 will be read after the jury is empanelled, before
2 we actually start or actually when we start the
3 trial itself. And they will just be burden of
4 proof, what is evidence --

5 MR. BOHYER: Judge, do you have
6 the numbers on those or not?

7 THE COURT: I have our numbers.

8 MR. BOHYER: Go ahead.

9 THE COURT: Direct and
10 circumstantial evidence, rulings on objections.
11 It's --

12 MR. BOHYER: It's the standard
13 ones.

14 THE COURT: Yes. Their conduct
15 as jurors, what they can do and not do as conduct
16 of jurors, taking notes, just all 9th Circuit
17 stock.

18 MR. HEENAN: Is it your intent at
19 that time to give, Your Honor, status of the case
20 instruction or some type of an explanation of
21 what you've done and what is left for the jury to
22 resolve?

23 THE COURT: As I said, I'm going
24 to talk to them about that in voir dire to some
25 extent. And that's one of the things that I want

1 to rework given what we have done here today.
2 Because there was some stuff in the agreed facts
3 and the statement of the case, as you agreed on,
4 that talked about the Court's ruling. We are
5 going to do that a little bit differently now
6 based on our discussions today. So yeah, I will
7 tell them that.

8 MR. BOHYER: Judge, do you intend
9 in that instruction to advise the jury that the
10 FDCPA conclusion that you reached is a strict
11 liability position?

12 THE COURT: No, I don't think I
13 need to. Because then I need to talk about bona
14 fide area of defense and that kind of thing. I
15 think what they need to know is under the Fair
16 Debt Collection Practices Act, I have determined
17 that the act was breached in these ways. And
18 their only role, then, on that claim is to
19 determine the damages. And --

20 MR. BOHYER: If any.

21 THE COURT: If any. Let's talk
22 about damages, but I don't think we need it on
23 the record.

24 Is there anything else that
25 anyone wants to put on the record?

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1 MR. SIMPSON: I move to exclude
2 witnesses under 615.

3 THE COURT: Okay. They will be
4 excluded.

5 Anything else?

6 MR. BOHYER: There was something
7 I addressed and you said, "Remind me before we
8 leave today." What was that?

9 MR. SIMPSON: Oh, we would like
10 the Court's leave to file any Original deposition
11 transcripts.

12 THE COURT: Okay. Yes, you may
13 do so.

14 MR. SIMPSON: Do we need an NEF
15 or such other order? The clerk's office is here,
16 I see.

17 THE COURT CLERK: Yeah, when you
18 file them, you will get an NEF. We will have to
19 file them in the office.

20 MR. SIMPSON: Do we need a cover
21 page thing pursuant to the order?

22 THE COURT CLERK: Yes, and then
23 we will attach.

24 MR. BOHYER: John, will you file
25 the Originals that you have?

1 MR. HEENAN: Sure.

2 THE COURT: Okay. Anything else?

3 MR. SIMPSON: With respect to the
4 settlement agreement, do we have the Court's
5 permission to disclose that to our client's
6 insurer that is defending?

7 THE COURT: Yes. But they are
8 subject to the same.

9 MR. BOHYER: We will advise that.
10 I'm sure, when we ARE dealing with counsel, they
11 understand the ramifications.

12 THE COURT: Anything else?

13 MR. SIMPSON: When will we get
14 the list of potential jurors?

15 THE COURT: Should have them very
16 soon.

17 THE COURT CLERK: I think she
18 tries to get them out the Wednesday before. We
19 keep getting changes up until the morning of the
20 trial. So I think she faxes them out Wednesday
21 to all the counsel.

22 THE COURT: So tomorrow.

23 MR. BOHYER: You fax them out.

24 THE COURT CLERK: Yes, I think
25 she faxes them. Heather does that, and I'm not

1 exactly sure, but I think she does.

2 MR. BOHYER: How big of a pool
3 are you drawing here?

4 THE COURT: 40.

5 MR. SIMPSON: There is one other
6 issue that John had raised, and I don't want to
7 beat around the bush. I listed Mr. Heenan as a
8 may call witness. Frankly, I don't know that I
9 would intend to call him except that it may
10 depend on what testimony he elicits from Mr.
11 Lucero and Ms. Henan.

12 Apparently he is their counsel as
13 well, and I believe there is a good chance they
14 will testify they don't have personal knowledge
15 of what happened in the other cases, they don't
16 even know anything about the McCullough case or
17 each other's case. Their source of information
18 is likely Mr. Heenan. I haven't worked up any
19 line of testimony, but I wanted to put this issue
20 out there because it would be disruptive if it
21 happened in the trial.

22 THE COURT: I appreciate that. I
23 don't anticipate that those people will be
24 testifying about anybody else's claim.

25 MR. HEENAN: They won't, Your

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1 Honor.

2 THE COURT: If you open the door,
3 then we have a problem. If all they testify is
4 what they know about their own experience with
5 JRL, we shouldn't reach those.

6 MR. BOHYER: I trust we are
7 entitled to ask those witnesses what the source
8 of their information is.

9 THE COURT: You can ask if they
10 have testified based on their own knowledge or if
11 they testified based on knowledge they obtained
12 from others.

13 MR. HEENAN: If they are trying
14 to open the door to somehow invade the
15 attorney-client privilege to say, What did Mr.
16 Heenan tell you about how your case is like -- I
17 mean, all I want Ms. Henan and Mr. Lucero to say
18 is, Here's what happened to me. Here's the exact
19 thing that happened to me.

20 So on cross-examination, they are
21 allowed to say, how did you know what happened to
22 you is like what happened to Mr. McCullough, I
23 don't know if that even matters.

24 THE COURT: It doesn't matter
25 because they haven't said it was.

1 MR. BOHYER: We are not looking
2 to lead down the primrose path. I took Mr.
3 Lucero's deposition, and I'm not casting
4 aspersions at all, but he is not a real
5 sophisticated individual. And in response to
6 questions, I can certainly envision the man
7 making statements that are much broader than
8 responding to a narrow question.

9 So that's kind of what we are
10 looking at here. Because it's apparent that some
11 of the information they had about how they were
12 allegedly treated badly is akin to what happened
13 to Mr. McCullough here, that the source of that
14 information is indeed John Heenan.

15 THE COURT: We will have to take
16 this as it comes. I think I made it clear what
17 is permissible and what is not.

18 MR. BOHYER: We wanted to get it
19 out there. We will not raise that issue in front
20 of the jury without bringing it to the Court's
21 attention at sidebar.

22 THE COURT: Anything else on the
23 record?

24 Hearing nothing, we will close
25 out the record.

1 C E R T I F I C A T E O F O F F I C E R.

2

3 I, Virginia Leyendecker, a Certified Shorthand
4 Reporter and Notary Public, do hereby certify that
5 the foregoing is a true and accurate transcript of
6 the testimony as taken stenographically by and before
7 me at the date, time and location aforementioned.

8 I do further certify that I am neither a relative
9 nor employee, nor attorney or counsel to any parties
10 involved; that I am neither related to nor employed
11 by any such attorney or counsel, and that I am not
12 financially interested in the action.

13

14

15

16 /s/Virginia E. Leyendecker, CSR

17 Notary Public

18 My Commission expires May 3, 2010

19 NJ C.S.R. License No. XI-1701

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